JANUARY-SEPTEMBER-1979

UNITED STATES DEPARTMENT OF THE INTERIOR
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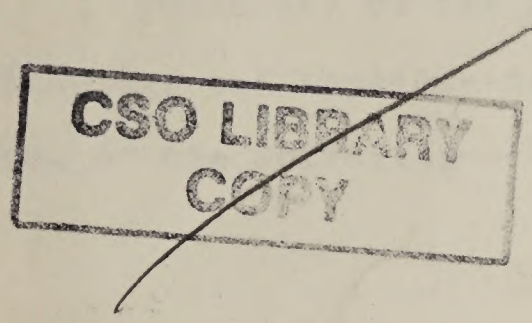
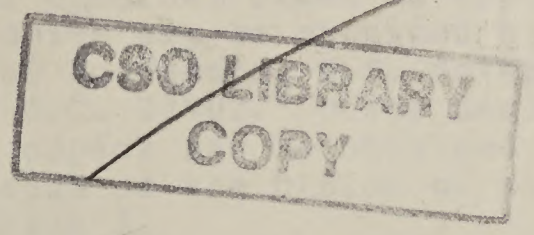
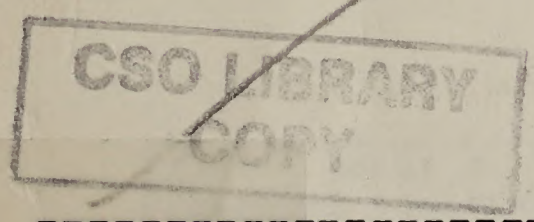


INDEX-DIGEST
JANUARY-SEPTEMBER 1979





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UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

Secretary of the Interior Cecil D. Andrus

Office of Hearings and Appeals--David B. Graham/Ruth R. Banks, Directors

Office of the Solicitor--------Leo M. Krulitz, Solicitor

INDEX-DIGEST

JANUARY-SEPTEMBER 1979

This index-digest covers all the published and all the important unpublished decisions and opinions of the Department of the Interior for the period from January 1, through September 30, 1979, rendered in the Office of Hearings and Appeals, Ballston Towers, Building No. 3, 4015 Wilson Boulevard, Arlington, Va. 22203 and in the Office of the Solicitor, Interior Building, 18th and C Streets, N.W., Washington, D.C. 20240.

Decisions and opinions cited as appearing in 86 I.D. are published and copies may be obtained by subscription from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Other decisions and opinions are unpublished and copies may be obtained from the Office of Hearings and Appeals or the Office of the Solicitor as provided in 43 CFR Part 2.

Editor: Betty H. Perry;
Editorial Assistant: Diane M. Garrison
Compositor: L. Lynne Dillard
--1979

CONTENTS

SYMBOLS

ANCAB - Alaska Native Claims Appeals Board
IA-T - Indian Appeals--Tort
IBCA - Interior Board of Contract Appeals
IBIA - Interior Board of Indian Appeals
IBLA - Interior Board of Land Appeals
IBMA - Interior Board of Mine Operations Appeals
IBSMA - Interior Board of Surface Mining Appeals
M - Solicitors Opinion
OHA - Office of Hearings and Appeals
SEC - Office of the Secretary

ACCOUNTS

GENERALLY

Land withdrawn for reclamation purposes in Imperial County, Calif., within the California Desert Conservation Area and administered by BLM under a memorandum of understanding with the Bureau of Reclamation should be regarded as "entitlement lands" in the computation of payments to be made to the county under the Act of Oct. 20, 1976, 31 U.S.C. § 1602 (1976).

County of Imperial, 40 IBLA 257 (Apr. 16, 1979)

PAYMENTS

BLM does not waive its right to declare a lease expired by cashing an advance annual rental check and placing funds in an unearned account.

Richard P. Smoot, 39 IBLA 1 (Jan. 8, 1979)

It is proper for the Bureau of Land Management to refuse to accept a filing fee check accompanying drawing entry cards for simultaneous oil and gas lease offers where the check bears the figure amount of $110, the correct amount due, and the typewritten amount of "One hundred eleven and no/100."

Bertram F. Rudolph, Jr., 39 IBLA 167 (Jan. 30, 1979)

Where a grantee seeks renewal of a right-of-way for a communication site, the Bureau of Land Management should require an advance annual payment at the rate formerly charged until a new fair market value rate may be established by appraisal. In the absence of contrary directives, the guideline in 43 CFR 2802.1-7(e) should be appliad to renewals of existing rights-of-way. Increased charges may not be imposed retroactively, but may be only imposed by the authorized officer, after reasonable notice and opportunity for hearing, beginning with the next charge year after the officer's decision.

Interest may be imposed on use charges for right-of-way sites depending on considerations of fairness and equity. In the absence of contrary directives, interest may be imposed for occupancy of a site where use charges should have been imposed at the same rate as past permitted use. Also, interest may be imposed on increased charges for the period commencing with the date from which increased charges are established.

Donald R. Clark, C. Reinhart & Son, Inc., Hartwell Excavating Co., 39 IBLA 182 (Jan. 31, 1979)

Where a lease under the Recreation and Public Purposes Act, as amended, 43 U.S.C. § 869 (1976), erroneously states the 1-year rental as being the rental for 5 years, and the lessee knew or had reason to know of the error, the error is a unilateral mistake, and the lease may be properly corrected to show the true rental, or the lease may be rescinded if appellant does not desire to be bound by the reformed agreement.

St. Scholastica Academy, 40 IBLA 175 (Apr. 3, 1979)

Land withdrawn for reclamation purposes in Imperial County, Calif., within the California Desert Conservation Area and administered by BLM under a memorandum of understanding with the Bureau of Reclamation should be regarded as "entitlement lands" in the computation of payments to be made to the county under the Act of Oct. 20, 1976, 31 U.S.C. § 1602 (1976).

County of Imperial, 40 IBLA 257 (Apr. 16, 1979)

ACCOUNTS--Continued

PAYMENTS--Continued

Where an offer is drawn No. 1 in a simultaneous oil and gas lease drawing and the offeror is notified by BLM that the rental due is $1,955, the offer will be disqualified under 43 CFR 3112.4-1 when the offeror submits a check for $1,954 within the time required, but fails to submit the $1 deficiency within the allowed time.

C. Panos, 42 IBLA 326 (Aug. 30, 1979)

REFUNDS

Failure to execute a lease results in forfeiture of the bid deposit by the high bidder in a competitive oil and gas lease sale.

Bernard P. Gencorelli, 43 IBLA 7 (Sept. 11, 1979)

ACQUIRED LANDS

The Mineral Leasing Act for Acquired Lands does not exclude from oil and gas leasing those lands underlying the Missouri River within the boundaries of the Fort Berthold Indian Reservation as established by the Treaty of Fort Laramie (1851) and the Executive Order of Apr. 12, 1870, which were reacquired by the United States from the Indian tribes. The exclusion in the Act for submerged lands refers to submerged coastal lands, as set forth in 43 CFR 3101.2-1(g).

Impel Energy Corp., 42 IBLA 105 (Aug. 16, 1979)

ACT OF JUNE 30, 1834

Appellant's contention that under sec. 22 of the Act of June 30, 1834, 4 Stat. 729, 733 (25 U.S.C. § 194 (1976)), the burden of proof cannot be assigned to the tribe is without merit. The issue framed by appellant does not align "Indians" against "whites." The primary relief sought by the tribe is the cancellation of trust patents which can only be held by Indians.

Administrative Appeal of Oglala Sioux Tribe v. Commissioner of Indian Affairs and Richard Tall (PRO-10542), 7 IBIA 188 (Sept. 5, 1979) 86 I.D. 425

ACT OF MARCH 2, 1889

Assuming, in the light most favorable to appellant, that the allotments at issue were subject to the final proviso of sec. 9 of the Act of Mar. 2, 1889, 25 Stat. 888, 891, we find no language in this or other sections of the Act evidencing an intention on the part of Congress that allotments--to be valid--required approval by the Oglala Sioux Tribe.

Administrative Appeal of Oglala Sioux Tribe v. Commissioner of Indian Affairs and Richard Tall (PRO-10542), 7 IBIA 188 (Sept. 5, 1979) 86 I.D. 425

ACT OF MARCH 3, 1891

An entryman may not take advantage of sec. 7 of the Act of Mar. 3, 1891, entitling an entryman to a patent after 2 years from date of issuance of a receiver's receipt when there is no pending contest or protest against the validity of the entry, where he has not

ACT OF MARCH 3, 1891--Continued

shown that preconditions of the Act have been met, i.e., making the final payments required.

United States v. Jack Zemmy Boyd, Jr., 39 IBLA 321 (Feb. 27, 1979)

ACT OF AUGUST 15, 1894

The Agreement of Dec. 4, 1893, between the Yuma (now Quechan) Indians and the United States, ratified in the Act of Aug. 15, 1894 (28 Stat. 286, 332) provided for a conditional cession of the nonirrigable land of the Fort Yuma Reservation. The conditions which included allotment and sale of surplus irrigable land and the opening of nonirrigable lands to settlement and entry, did not occur during the decade following the agreement and ratifying statute.

Title to Certain Lands Within the Boundaries of the Fort Yuma (now called Quechan) Indian Reservation, M-36908 (Jan. 2, 1979) 86 I.D. 3

ACT OF FEBRUARY 15, 1901

The Act of Feb. 15, 1901, 43 U.S.C. § 959 (1970), was repealed by sec. 706 of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2793, and any use or occupancy of public land granted subsequent to the effective date of FLPMA, Oct. 21, 1976, must be issued under authority of that Act. In authorizing the Secretary to grant rights-of-way, FLPMA provides that the Secretary shall require the applicant to submit certain information relating to the right-of-way, and a State Office notice enumerating such requirements is consistent with FLPMA.

William J. Colman, 40 IBLA 180 (Apr. 3, 1979)

ACT OF APRIL 21, 1904

Sec. 25 of the Act of Apr. 21, 1904 (33 Stat. 189, 224), which authorized the application of the 1902 Reclamation Act to the Fort Yuma and Colorado River Reservations, and which provided for the allotment and sale of surplus irrigable lands on those reservations, was unrelated to and was not intended to effect the conditional cession provided for in the 1893 agreement and the 1894 ratifying statute.

Title to Certain Lands Within the Boundaries of the Fort Yuma (now called Quechan) Indian Reservation, M-36908 (Jan. 2, 1979) 86 I.D. 3

ACT OF JULY 22, 1912

A decision holding that a tract of land has reverted to the United States must be affirmed where the land was patented to a municipality under authority of a special statute which expressly provided that the town shall not have the right to sell or convey any part thereof and that if the land shall not be used as public park it shall revert to the United States, and where the record shows that the municipality conveyed two small parcels to the State and has never used the remainder for park purposes in the intervening 60 years since the patent issued.

City of Okanogan, Washington, State of Washington, 41 IBLA 98 (June 4, 1979)

ACT OF DECEMBER 29, 1916

A bond filed by a mining claim owner, covering lands patented under the Stock-Raising Homestead Act of Dec. 29, 1916, as amended, 43 U.S.C. §§ 291-301 (1970), need only be set in an amount to cover damages to crops, improvements, and the value of the land for grazing purposes within the limits of the mining claim. The ad damnum of the bond does not have to be sufficient to cover damages caused by a disruption of the surface owner's entire grazing operation.

Where surface owners object to the amount of a bond, submitted to the Bureau of Land Management under sec. 9 of the Stock-Raising Homestead Act of Dec. 29, 1916, as amended, 43 U.S.C. § 299 (1970), as being inadequate in amount, request a hearing thereon, but fail to tender any evidence which would impel the conclusion that a hearing is likely to be productive and meaningful, the request for a hearing is properly denied.

The owner of a patented stock-raising homestead, in which the minerals have been reserved to the United States under the Act of Dec. 29, 1916, as amended, has a sufficient adverse interest under 43 CFR 4.450-1, to initiate a contest against a mining claimant, alleging lack of discovery of valuable minerals.

The issue of whether a mining claim has been perfected by discovery of available mineral has no place in a proceeding to determine whether the amount of a stock-raising homestead bond is sufficient.

Elmer Silvera et al., 42 IBLA 11 (July 25, 1979)

ACT OF MARCH 4, 1927

A grazing lease issued under the Alaska Grazing Act, 43 U.S.C. § 316 et seq. (1970), appropriates the lands and segregates them from the public domain, barring them from use and occupancy for Native allotment purposes until the Department takes action to exclude lands from the lease.

Herman Anderson, Jr., Nicholas Pestrikoff, Anthony Drabek, 41 IBLA 296 (June 29, 1979)

ACT OF AUGUST 12, 1953

Lands which were subject to an oil and gas lease offer on Sept. 20, 1951, were not open to mineral location, and mining claims located on such lands on this date are properly declared null and void in the absence of compliance with the redemption provisions of the Act of Aug. 12, 1953, and the Multiple Mineral Development Act, requiring filing of an amended notice of location prior to Dec. 10, 1953, in the place and manner in which the original notice was of record.

A mining claimant's failure to comply with the redemption provision of the Act of Aug. 12, 1953, and the Multiple Mineral Development Act is not excused because BLM failed to notify her of the availability of this provision.

Dorothy Smith, 39 IBLA 306 (Feb. 23, 1979)

ACT OF OCTOBER 8, 1964

Where the State Office, following recommendations of the National Park Service, rejects applications for oil and gas leases under the "excepted areas" provisions of 43 CFR 3111.1-3(e)(4), and where it appears that large portions of the applied-for lands do not fall within such areas, the case will be remanded to reconsider whether the leasing of lands not in excepted areas would be appropriate.

D. L. Percell, 40 IBLA 126 (Mar. 28, 1979)

ACT OF OCTOBER 15, 1966

The grant of a right-of-way to cross Federal land for a proposed pipeline which is neither Federally authorized nor funded is an "undertaking" within the meaning of the National Historic Preservation Act, as amended, 80 Stat. 915, 16 U.S.C. § 470 et seq. (1976). However, construction of segments of the pipeline which do not cross Federal land, and which are neither Federally licensed nor funded, is not an "undertaking" under that Act, and the provisions of that Act do not apply to such segments.

Western Slope Gas Co., 40 IBLA 280 (Apr. 18, 1979)

ACT OF SEPTEMBER 26, 1968

Where an applicant under the Unintentional Trespass Act, 43 U.S.C. § 1431 (1976), had mistakenly described the land being sought, the application may not be amended after Sept. 25, 1971, to conform the land description to the land actually in trespass.

DeRalph S. Bunting, 41 IBLA 13 (May 22, 1979)

ACT OF DECEMBER 31, 1970

The Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a (1970), does not require the granting of permission for placer mining operations on land within a powersite withdrawal where such operations would probably interfere with other uses of the land.

United States v. Edward J. Connolly, Jr., Idaho Fish and Game Department (Intervenor), 40 IBLA 30 (Mar. 15, 1979)

ACT OF OCTOBER 20, 1976

Land withdrawn for reclamation purposes in Imperial County, Calif., within the California Desert Conservation Area and administered by BLM under a memorandum of understanding with the Bureau of Reclamation should be regarded as "entitlement lands" in the computation of payments to be made to the county under the Act of Oct. 20, 1976, 31 U.S.C. § 1602 (1976).

County of Imperial, 40 IBLA 257 (Apr. 16, 1979)

ADMINISTRATIVE AUTHORITY

GENERALLY

Reliance upon erroneous notations to a BLM serial register page or incomplete information provided by BLM employees cannot create any rights not authorized by law.

Alver C. Duncan, 39 IBLA 144 (Jan. 29, 1979)

Under the Supremacy Clause, U.S. CONST., art. VI, cl. 2, Federal laws, including Federal grazing regulations, override conflicting State laws with respect to public lands.

Colvin Cattle Co., Inc., 39 IBLA 176 (Jan. 30, 1979)

ADMINISTRATIVE AUTHORITY--Continued

GENERALLY--Continued

Where the Secretary has declined to exercise his jurisdiction, a decision rendered by this Board is final for the Department. Hence, statements by BLM and arguments of the Solicitor, while valuable to the Board, are not binding upon the Board.

H. R. Delasco, Inc., et al., 39 IBLA 194 (Feb. 2, 1979)

Subsequent to the passage of the Federal Land Policy and Management Act of 1976 (FLPMA), the Department lacked the authority to accept donations of land under the Act of July 14, 1960, which had been expressly repealed by FLPMA. Inasmuch as the actions of the Secretary under the Act of July 14, 1960, were not ministerial, the doctrine of relation cannot be used to validate, on a nunc pro tunc basis, an acceptance of a donation under the authority of the Act of July 14, 1960, occurring after the repeal of that Act by Congress.

Junior L. Dennis, 40 IBLA 12 (Mar. 9, 1979)

Reliance upon erroneous information given by BLM employees cannot confer upon an oil and gas lease applicant any rights not authorized by law.

Elizabeth Pagedas (On Reconsideration), 40 IBLA 21 (Mar. 9, 1979)

Established and longstanding Departmental policy relating to the administration of the simultaneous oil and gas leasing system, premised upon regulatory interpretation, is binding on all employees of the Bureau of Land Management, until such time as it is properly changed.

Milton D. Feinberg, Benson J. Lamp (On Reconsideration), 40 IBLA 222 (Apr. 11, 1979) 86 I.D. 234

Reliance on incomplete information supplied by Bureau of Land Management employees cannot estop the United States or excuse compliance with a regulation.

Fred S. Ghelarducci, 41 IBLA 277 (June 28, 1979)

Where an Agency lays down its own procedures and regulations, those procedures and regulations cannot be ignored, even by the Agency itself.

Estate of Emory Dennis Juneau, 7 IBIA 164 (June 29, 1979)

A decision by the Bureau of Land Management canceling fee simple patents issued to Indians and simultaneously issuing new Indian trust patents is not subject to review by the Board of Land Appeals, which has no jurisdiction in the matter, where the decision was made at the direction of the Assistant Secretary for Indian Affairs.

Blue Star, Inc., Atomic Western, Inc., Fremont Energy Corp., Ivor Adair, 41 IBLA 333 (July 11, 1979)

The Taylor Grazing Act, 43 U.S.C. §§ 315a-315r (1970), and other statutory authority empower the Secretary of the Interior to define what conduct constitues a grazing

ADMINISTRATIVE AUTHORITY--Continued

GENERALLY--Continued

trespass and whether or not an individual has committed a trespass.

Bureau of Land Management v. Harris Brothers, 42 IBLA 48 (July 31, 1979)

Department of the Interior, as agency of executive branch of Government, is not proper forum to decide whether or not as to mining claims the recordation provisions of the Federal Land Policy and Management Act of 1976 are constitutional.

Charlie Carnal, Walter Peck, and Edward Borzansky, 43 IBLA 10 (Sept. 11, 1979)

ENFORCEMENT OF CRIMINAL VIOLATIONS

The Board of Land Appeals, in its adjudication of appeals to determine rights of parties to receive or preserve interests in Federal lands, has a concomitant obligation to preserve the integrity of the process, and where it appears to the Board that the administrative record of a case contains strong evidence of multiple violations of 18 U.S.C. § 1001 (1976), the Board will refer the matter with its recommendation that an investigation be initiated to determine whether criminal charges should be brought.

Lee S. Bielski, 39 IBLA 211 (Feb. 8, 1979) 86 I.D. 80

ESTOPPEL

Reliance upon erroneous notations to a BLM serial register page or incomplete information provided by BLM employees cannot create any rights not authorized by law.

Alver C. Duncan, 39 IBLA 144 (Jan. 29, 1979)

Equitable estoppel against the Government will not lie where there has been no affirmative misconduct by an authorized agent or officer resulting in a misrepresentation of fact upon which a party was led to rely to his ultimate detriment.

Dorothy Smith, 39 IBLA 306 (Feb. 23, 1979)

Reliance on incomplete information supplied by Bureau of Land Management employees cannot estop the United States or excuse compliance with a regulation.

Fred S. Ghelarducci, 41 IBLA 277 (June 28, 1979)

Inaction or unauthorized acts by an employee of the Bureau of Indian Affairs cannot serve as the basis for conferring rights not authorized by law. Moreover, neither the Secretary of the Interior nor the Department is bound or estopped by such inaction or unauthorized acts.

Estate of Emory Dennis Juneau, 7 IBIA 164 (June 29, 1979)

ADMINISTRATIVE AUTHORITY--Continued

ESTOPPEL--Continued

Reliance upon erroneous advice or incomplete information provided by BLM employees cannot relieve the owner of a mining claim of an obligation imposed on him by statute or relieve him of the consequences imposed by a statute for his failure to comply with its requirements.

Clair R. Caldwell et al., 42 IBLA 139 (Aug. 16, 1979)

A delay in adjudication of an application by the Department cannot create rights contrary to law.

New England Fish Co., 42 IBLA 200 (Aug. 22, 1979)

LACHES

A delay in adjudication of an application by the Department cannot create rights contrary to law.

New England Fish Co., 42 IBLA 200 (Aug. 22, 1979)

ADMINISTRATIVE PRACTICE

A final Departmental appellate decision construing a regulation will be given immediate effect, and will not be applied with prospective effect only, unless the decision alters materially the interpretation given the regulation by earlier Departmental decisions or official published opinions, and unless the equitable benefit of the decision is not outweighed by ill effects of allowing a benefit in derogation of the regulation.

Gertrude H. D'Amico, 39 IBLA 68 (Jan. 17, 1979)

Where the Secretary has declined to exercise his jurisdiction, a decision rendered by this Board is final for the Department. Hence, statements by BLM and arguments of the Solicitor, while valuable to the Board, are not binding upon the Board.

The interpretation of an existing regulation by this Board to determine its applicability to the facts at hand does not constitute rulemaking by the Board.

H. R. Delasco, Inc., et al., 39 IBLA 194 (Feb. 2, 1979)

Where a protestant against the issuance of an oil and gas lease supports his allegations that the lease offer is not qualified with sufficient evidence to warrant further inquiry or investigation by BLM, the protest should not be summarily dismissed for failure of the protestant to make positive proof of his allegations. Instead, the protest should be adjudicated on its merits after all available information has been developed.

Lee S. Bielski, 39 IBLA 211 (Feb. 8, 1979) 86 I.D. 80

Where the Director, Bureau of Land Management, has specified which kinds of discrepancies will result in the exclusion of drawing entry cards from a drawing of simultaneously filed oil and gas lease offers, and directs that all other cards are to be included in the drawings, the action of one field office to exclude certain other types of cards will be reversed as being in contravention of such directive.

Helen E. Serencha, 39 IBLA 318 (Feb. 23, 1979)

ADMINISTRATIVE PRACTICE--Continued

Subsequent to the passage of the Federal Land Policy and Management Act of 1976 (FLPMA), the Department lacked the authority to accept donations of land under the Act of July 14, 1960, which had been expressly repealed by FLPMA. Inasmuch as the actions of the Secretary under the Act of July 14, 1960, were not ministerial, the doctrine of relation cannot be used to validate, on a nunc pro tunc basis, an acceptance of a donation under the authority of the Act of July 14, 1960, occurring after the repeal of that Act by Congress.

Junior L. Dennis, 40 IBLA 12 (Mar. 9, 1979)

Established and longstanding Departmental policy relating to the administration of the simultaneous oil and gas leasing system, premised upon regulatory interpretation, is binding on all employees of the Bureau of Land Management, until such time as it is properly changed.

Milton D. Feinberg, Benson J. Lamp (On Reconsideration), 40 IBLA 222 (Apr. 11, 1979) 86 I.D. 234

It is proper to set aside a decision which raises questions concerning the facts asserted by BLM in rejecting an oil and gas lease offer, and to remand the case to BLM for further review and consideration of appellant's allegations.

Robert W. David, 40 IBLA 236 (Apr. 16, 1979)

Where a protestant against the issuance of leases, for oil and gas presents evidence demonstrating the existence of a written partnership between joint offers, and the offerors have not complied with the regulations requiring certain showings of partnerships, the offers cannot be honored.

American Quasar Petroleum Co., 42 IBLA 243 (Aug. 22, 1979)

ADMINISTRATIVE PROCEDURE

GENERALLY

A notice of appeal must be filed within 30 days after appellant is served with the decision from which he is appealing. When a party does not appeal, the doctrine of administrative finality, the administrative equivalent of res judicata, generally bars consideration of the same issue in a later appeal.

Ralph and Ruth Dickinson, 39 IBLA 258 (Feb. 15, 1979)

When a State Office rejects the offer of a first-drawn applicant in a drawing under the simultaneous oil and gas leasing program, an appeal by the applicant raises the issue of his qualifications to hold the lease. The qualifications of the second-drawn applicant are irrelevant until such time as the offer of the first-drawn applicant is rejected and all his avenues of appeal are exhausted. However, it is not improper for BLM to name the second-drawn applicant as an adverse party in a decision rejecting the first-drawn applicant.

Thomas R. Flickinger, William S. Flickinger, et al., 40 IBLA 53 (Mar. 16, 1979)

ADMINISTRATIVE PROCEDURE--Continued

GENERALLY--Continued

Regulation 43 CFR 4.450-1 gives a person with an adverse interest in land a right to contest an adverse claim. The Department of the Interior has consistently recognized States as included within the term "person" within the meaning of the regulation, allowing them to initiate private contests.

Where the State of Alaska has shown an interest in land in its existing airport, it may bring a private contest to challenge Native allotment applications for land in conflict with the airport.

State of Alaska, 40 IBLA 79 (Mar. 22, 1979)

The State of Alaska will be afforded time within which to bring private contests against Native allotment applications conflicting with an existing airport runway built by the State and to show it has standing to contest. If it does so timely, the Bureau of Land Management will adjudicate its standing as a contestant and the contests will proceed if it finds affirmatively. If not, the State's timely objections will be taken as a protest and a factfinding hearing will be held. If the State fails to take timely action, a decision rejecting its application to reinstate a conflicting airport lease application will stand.

State of Alaska, 40 IBLA 118 (Mar. 27, 1979)

Where the Geological Survey, in making its decision, has reviewed the same information submitted on appeal to the Board of Land Appeals to show that there was a well capable of producing oil or gas in paying quantities on the date the lease expired, and there are no disputed facts, but only a dispute on the proper application of the law to those facts and legal interpretations, a hearing is not warranted in the case.

American Resources Management Corp., 40 IBLA 195 (Apr. 5, 1979)

Where the Bureau of Land Management determines that an Alaska Native allotment application should be rejected because the land was not used and occupied by the applicant, the BLM shall issue a contest complaint pursuant to 43 CFR 4.451 et seq. Upon receiving a timely answer to the complaint, which answer raises a disputed issue of material fact, the Bureau will forward the case file to the Hearings Division, Office of Hearings and Appeals, Department of the Interior, for assignment of an administrative law judge, who will proceed to schedule a hearing, at which the applicant may produce evidence to establish entitlement to his allotment.

John Moore et al., 40 IBLA 321 (Apr. 30, 1979) 86 I.D. 279

The applicable regulation, 43 CFR 4.414 (1977), allows the Board some discretion in deciding whether to disregard the answer of an appellee who fails to file an answer within 30 days after service on him of the notice of appeal or statement of reasons and whose delay in filing is not waived under the provisions of 43 CFR 4.401(a) (1977).

California Portland Cement Co., Rosebud Coal Sales Co., 40 IBLA 339 (May 10, 1979)

ADMINISTRATIVE PROCEDURE--Continued

GENERALLY--Continued

Where an applicant for an Alaska Native allotment was a minor at the time she alleges the initial use and occupancy of the land, but not so young as to preclude any possibility that she was then capable of doing so as an independent citizen in her own right to the potential exclusion of others, prior to rejection of her application on the basis of her youth BLM should provide notice and an opportunity for hearing.

Nellie Boswell Beecroft, 41 IBLA 70 (May 31, 1979)

Where Bureau of Land Management determines an application for a Native allotment should be rejected for failure to establish use and occupancy of the land, Bureau of Land Management should initiate a contest proceeding pursuant to 43 CFR 4.451 et seq.

Frederick Phillips et al., 41 IBLA 169 (June 22, 1979)

Ella S. Sheldon et al., 42 IBLA 276 (Aug. 27, 1979)

Where the Bureau of Land Management (BLM) determines that an Alaska Native allotment application should be rejected in part because the Native did not use all of the land applied for, the BLM shall initiate a contest proceeding pursuant to 43 CFR 4.451 et seq.

Frank Rulland, 41 IBLA 207 (June 27, 1979) 86 I.D. 342

Broad discretion is committed to an agency in interpreting regulations. A party challenging an interpretation and the administrative application thereof must demonstrate that the interpretation is unreasonable and that the agency's application lacks a rational foundation.

Harry A. Zuckerman et al., 41 IBLA 372 (July 23, 1979)

"Person." Regulation 43 CFR 4.450-1 specifically gives persons with an adverse interest in land a right to contest the adverse claim. It does not depend on the applicability of the due process clause of the Constitution to either claimant. A State is a "person" within the meaning of this private contest regulation.

State of Alaska, 42 IBLA 1 (July 25, 1979)

Where BLM fails to show that there was service of a decision rejecting an Alaska Native allotment and the applicant learns of his rejection 4-1/2 years after rejection, the applicant may file a timely appeal within 30 days of notice of the decision.

Mailing to the Bureau of Indian Affairs a carbon copy of a decision rejecting an application for an Alaska Native allotment is not service upon the applicant so as to comply with 43 CFR 4.401.

Gust J. Reft, Sr., 42 IBLA 86 (Aug. 13, 1979)

Generally the Geological Survey may reconsider and modify or revoke its own decision in the absence of an appeal to the Board of Land Appeals. However, the filing of an appeal to the Board removes the matter from the jurisdiction of Survey pending disposition of the appeal.

Where Geological Survey and one of two parties to a compulsory unitization of two outer continental shelf oil and gas leases request a remand of a Survey decision for further consideration, and certain issues raised on appeal would appropriately be better first

ADMINISTRATIVE PROCEDURE--Continued

GENERALLY--Continued

considered by Survey, the case will be remanded to Survey. In the circumstances, a request to stay implementation of Survey's prior decision may be granted by the Board unless and until Survey acts upon the request when it reconsiders the case.

Sun Oil Co., 42 IBLA 254 (Aug. 23, 1979)

In a mining claim contest where a contestee is of the opinion that the Government did not make a prima facie case of no discovery, he may move to have the case dismissed at the conclusion of the Government's case and then rest. The contest complaint could be dismissed if the administrative law judge rules that no prima facie case had been made of lack of discovery and there is no other evidence in the record to support the charges in the complaint. But if the contestee goes forward after making such a motion to dismiss and presents his evidence, that evidence must be considered as part of the entire record and its probative value will be weighed. Thus, even if the Government has failed to make a prima facie case, evidence presented by the contestee which supports the Government's contest charges may be used against the contestee, regardless of the defects in the Government's case.

United States v. Andy Syndbad, 42 IBLA 313 (Aug. 29, 1979)

ADJUDICATION

Failure to file a timely answer to a mining claim contest complaint will result in the charges in the complaint being taken as admitted and the case being decided without a hearing. Where contestees deny the allegations in the complaint only as to 4 claims but not as to 15 other claims addressed in the complaint, the complaint will be taken as admitted as to the 15 claims not addressed in the answer to the complaint.

United States v. Jerry Prock et al., 39 IBLA 148 (Jan. 29, 1979)

The interpretation of an existing regulation by this Board to determine its applicability to the facts at hand does not constitute rulemaking by the Board.

H. R. Delasco, Inc., et al., 39 IBLA 194 (Feb. 2, 1979)

In order to sustain a charge that an administrative law judge should be disqualified or his decision set aside because of bias, a substantial showing of personal bias must be made. An assumption that he might be predisposed in favor of the Government is not sufficient.

United States v. Leroy S. Johnson et al., 39 IBLA 337 (Feb. 28, 1979)

State of Alaska selection applications should not be rejected because of conflicts with Native allotment applications which are to be approved without first affording the State notice of such action to be taken and an opportunity to contest the conflicting claims if it desires.

State of Alaska et al., 41 IBLA 315 (July 11, 1979)
86 I.D. 361

ADMINISTRATIVE PROCEDURE--Continued

ADJUDICATION--Continued

State of Alaska applications for prior-filed airport conveyances of land needed for an existing airport should not be rejected because of conflicts with Native allotment applications which are to be approved without first affording the State notice of such action to be taken and an opportunity to contest the conflicting claims if it desires.

State of Alaska, 42 IBLA 1 (July 25, 1979)

Where, on appeal, a mining claimant alleges that he timely mailed the affidavits of assessment work to the proper BLM office but there is no evidence to indicate they were ever received, the claimant must bear the consequences of the loss and his inability to prove his allegation that they may have been received by the Bureau and subsequently lost.

Amanda Mining & Manufacturing Ass'n., 42 IBLA 144 (Aug. 16, 1979)

Roger Kuhn, 43 IBLA 182 (Sept. 28, 1979)

ADMINISTRATIVE PROCEDURE ACT

Neither a Recreation and Public Purposes Act classification nor a withdrawal is a rule or regulation within the ambit of the Secretarial policy of Apr. 27, 1971, which provides for utilization of the public participation procedures of 5 U.S.C. § 553 (1976).

Mining claims purportedly located on land not available for such location confer no property right upon the locator, and may be declared null and void ab initio without a hearing under 5 U.S.C. § 554 et seq. (1976).

Delmer McLean et al., 40 IBLA 34 (Mar. 15, 1979)

Whether the issuance of PLO No. 5448, prohibiting oil and gas leasing in Alaska, without prior proposed rulemaking is violative of the Administrative Procedure Act or of the Alaska Native Claims Settlement Act need not be decided; by such issuance the Secretary has enunciated a policy of rejecting mineral lease applications well within his discretionary authority.

Bristol Bay Native Corp., 41 IBLA 85 (June 4, 1979)

ADMINISTRATIVE REVIEW

Where the holder of an oil and gas lease on the Outer Continental Shelf has filed a suit in a Federal district court to recover certain royalties paid under his lease, the Board of Land Appeals will affirm a decision of the Director, Geological Survey, holding in abeyance the lessee's request for a refund while the suit is pending.

Tenneco Oil Co., 41 IBLA 195 (June 22, 1979)

A decision by the Bureau of Land Management canceling fee simple patents issued to Indians and simultaneously issuing new Indian trust patents is not subject to review by the Board of Land Appeals, which has no jurisdiction in the matter, where the decision was made at the direction of the Assistant Secretary for Indian Affairs.

Blue Star, Inc., Atomic Western, Inc., Fremont Energy Corp., Ivor Adair, 41 IBLA 333 (July 11, 1979)

ADMINISTRATIVE PROCEDURE--Continued

BURDEN OF PROOF

When the Government contests a mining claim on a charge of no discovery, it bears the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made.

Where a Government mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery, a prima facie case of invalidity has been established.

United States v. Russ Knecht, 39 IBLA 8 (Jan. 8, 1979)

The burden of proving a valid color of title claim is on the claimant. Where it cannot be said from the evidence presented that the grantors and grantees in the claimant's chain of title acquired a parcel of land with the bona fide belief that the parcel included all the land claimed, the color of title application must be denied.

Mable M. Farlow (On Reconsideration after Hearing), 39 IBLA 15 (Jan. 11, 1979) 86 I.D. 22

A district manager's decision reached in the exercise of administrative discretion pursuant to the Taylor Grazing Act of 1934 may be regarded as arbitrary or capricious only where it is not supportable on any rational basis and the burden is on the appellant to show by substantial evidence that the decision is improper. A district manager's decision not to reissue a grazing lease for a certain area until that area is fenced and to reduce appellant's AUM's accordingly rests on a rational basis where the facts show that this unfenced area adjoins the bombing range and grazing thereon could result in trespass on the bombing range, inconsistent with the use of the range.

Colvin Cattle Co., Inc., 39 IBLA 176 (Jan. 30, 1979)

After holding a hearing pursuant to the Administrative Procedure Act, an administrative law judge may properly find that a person has committed a grazing trespass if that finding is in accordance with and supported by reliable, probative and substantial evidence.

Bureau of Land Management v. Holland Livestock Ranch et al., 39 IBLA 272 (Feb. 15, 1979) 86 I.D. 133

In a contest proceeding the Government has the burden of establishing a prima facie case of noncompliance with the requirements for trade and manufacturing, and headquarters sites. The burden then shifts to the applicant to show by a preponderance of the evidence that he has used, occupied, and improved the sites for trade, manufacture, or other productive industry.

United States v. Jack Zemmy Boyd, Jr., 39 IBLA 321 (Feb. 27, 1979)

Applicant has burden of establishing entitlement to headquarters site claim, and must demonstrate that he has complied with statute and regulations.

United States v. Henry Jay Bush, 40 IBLA 106 (Mar. 27, 1979)

ADMINISTRATIVE PROCEDURE--Continued

BURDEN OF PROOF--Continued

The Government has established a prima facie case of a lack of discovery, thus shifting the burden of going forward, when an expert witness testified that he has examined the claim and has found the mineral value insufficient to support a finding of discovery.

United States v. Tempest Mining Co., 40 IBLA 297 (Apr. 27, 1979)

Broad discretion is committed to an agency in interpreting regulations. A party challenging an interpretation and the administrative application thereof must demonstrate that the interpretation is unreasonable and that the agency's application lacks a rational foundation.

Harry A. Zuckerman et al., 41 IBLA 372 (July 23, 1979)

When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case. Where a Government mineral examiner testifies that he has examined a claim and found the quantity of minerals insufficient to support a finding of discovery, a prima facie case of invalidity has been established and the burden shifts to the claimants to show by a preponderance of the evidence that a discovery has been made. Government mineral examiners are not required to perform discovery work for a claimant or to explore beyond a claimant's workings.

The entire evidentiary record in a mining contest is considered and if evidence presented by a contestee is damaging to the contestee's case it may be used against the contestee regardless of any deficiencies in the Government's presentation. Therefore, regardless of whether the Government established a prima facie case of lack of discovery, if the entire record establishes that a discovery was not made on a claim it is properly declared null and void.

United States v. William Lavon Chappell et al., 42 IBLA 74 (Aug. 13, 1979)

The burden of establishing a valid color of title claim is on the claimant.

Joe I. Sanchez and Celina V. Sanchez, et al., 42 IBLA 176 (Aug. 22, 1979)

When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made.

Where a Government mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery, a prima facie case of validity has been established. Government mineral examiners are not required to perform discovery work for claimants or to explore beyond a claimant's workings.

United States v. Emmett C. Harder, 42 IBLA 206 (Aug. 22, 1979)

ADMINISTRATIVE PROCEDURE--Continued

BURDEN OF PROOF--Continued

In review proceedings of notices of violation and cessation orders, the burden of going forward to establish a prima facie case rests with OSM and the ultimate burden of persuasion rests with the applicant for review.

Dean Trucking Co., Inc., 1 IBSMA 229 (Sept. 11, 1979) 86 I.D. 437

Where a Government mineral examiner testifies that he has examined a claim and found the mineral value insufficient to support a finding of discovery, a prima facie case of invalidity has been established. Government mineral examiners are not required to perform discovery work for claimants nor to explore beyond a claimant's workings.

When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made.

United States v. Edward T. McHenry et al., 43 IBLA 122 (Sept. 26, 1979)

When the Government contests a mining claim on a charge of lack of discovery, the Government has the burden of proving a prima facie case; the burden then shifts to the mining claimant to prove by a preponderance of the evidence that discovery exists.

United States v. Ted G. Ax, 43 IBLA 146 (Sept. 28, 1979)

DECISIONS

After holding a hearing pursuant to the Administrative Procedure Act, an administrative law judge may properly find that a person has committed a grazing trespass if that finding is in accordance with and supported by reliable, probative and substantial evidence.

Bureau of Land Management v. Holland Livestock Ranch et al., 39 IBLA 272 (Feb. 15, 1979) 86 I.D. 133

HEARING EXAMINERS

In order to sustain a charge that an administrative law judge should be disqualified or his decision set aside because of bias, a substantial showing of personal bias must be made. An assumption that he might be predisposed in favor of the Government is not sufficient.

United States v. Leroy S. Johnson et al., 39 IBLA 337 (Feb. 28, 1979)

HEARINGS

The notice and opportunity for hearing envisaged by 43 CFR 2802.1-7(e) requires at a minimum that the lessee be provided with a copy of the appraisal report, that he be permitted to appear before the decisionmaker, that the decisionmaker not be the person who made or approved the appraisal, and that adequate records of the hearing conducted pursuant to the regulations be maintained.

Donald R. Clark, C. Reinhart & Son, Inc., Hartwell Excavating Co., 39 IBLA 182 (Jan. 31, 1979)

ADMINISTRATIVE PROCEDURE--Continued

HEARINGS--Continued

After holding a hearing pursuant to the Administrative Procedure Act, an administrative law judge may properly find that a person has committed a grazing trespass if that finding is in accordance with and supported by reliable, probative and substantial evidence.

Bureau of Land Management v. Holland Livestock Ranch et al., 39 IBLA 272 (Feb. 15, 1979) 86 I.D. 133

The Government has established a prima facie case of a lack of discovery, thus shifting the burden of going forward, when an expert witness testified that he has examined the claim and has found the mineral value insufficient to support a finding of discovery.

United States v. Tempest Mining Co., 40 IBLA 297 (Apr. 27, 1979)

Alaska Natives who allege substantial use and occupancy of vacant, unappropriated, and unreserved public land in Alaska for a period of at least 5 years pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970), and the regulations at 43 CFR Subpart 2561 are entitled to notice and an opportunity for a hearing prior to rejection of their application. Such notice shall specify the reasons for the proposed rejection. Claimant shall have an opportunity to present evidence and testimony of favorable witnesses at a hearing before the trier of fact prior to a decision.

John Moore et al., 40 IBLA 321 (Apr. 30, 1979) 86 I.D. 279

When an Alaska Native allotment applicant alleges that there has been substantial use and occupancy of vacant, unappropriated, and unreserved public land in Alaska for a period of at least 5 years pursuant to 43 U.S.C. §§ 270-1 to 270-3 (1970) and 43 CFR Subpart 2561, and the Bureau of Land Management determines the application should be rejected because the land was not so used and occupied, the Native is entitled under contest procedures, 43 CFR 4.451, to notice and an opportunity for a hearing prior to rejection of his application.

Mary Bobby, 41 IBLA 44 (May 29, 1979)

Rika Murphy, Gene H. Smagge, 42 IBLA 51 (July 31, 1979)

Where issues of material fact are in dispute, due process requires that an applicant for a Native allotment be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment.

Where Bureau of Land Management determines an application for a Native allotment should be rejected for failure to establish use and occupancy of the land, Bureau of Land Management should initiate a contest proceeding pursuant to 43 CFR 4.451 et seq.

Frederick Phillips et al., 41 IBLA 169 (June 22, 1979)

Ella S. Sheldon et al., 42 IBLA 276 (Aug. 27, 1979)

ADMINISTRATIVE PROCEDURE--Continued

HEARINGS--Continued

Where legal conclusions are reached in an appellate decision upon undisputed facts, and there has been no proffer of further facts which could compel different legal conclusions, no useful purpose would be served for a hearing, and a request therefor is properly denied.

Floyd L. Anderson, Sr., 41 IBLA 280 (June 28, 1979) 86 I.D. 345

Peter Panruk, 43 IBLA 69 (Sept. 19, 1979)

A request for a hearing on a Native allotment application will be denied where there are no facts in dispute and the sole question is a legal issue.

Lindberg Alexander, 41 IBLA 382 (July 23, 1979)

Two mining claims, located at a time when the land is withdrawn from mineral entry, may be properly declared null and void ab initio without a hearing. Such a result obtains despite reference to a location notice prior to the withdrawal where appellants do not make a showing of sufficient specific facts upon which to predicate a hearing, including which of the claims the previous location relates to, the boundaries thereof, whether the previous location was for a locatable mineral under a withdrawal order then in force, and the name of the previous locator.

The Heirs of M. K. Harris, 42 IBLA 44 (July 3, 1979)

The substantial use and occupancy required under the Native Allotment Act must be achieved by the Native himself as an independent citizen (or family head) and such use must be at least potentially exclusive of others. Although a minor may initiate such use and occupancy, use and occupancy by a dependent accompanied by his parents does not qualify.

Where a Native allotment application has been rejected, based on the guidelines of Oct. 18, 1973, on the basis that the applicant had not demonstrated 5 years use and occupancy of the land prior to the withdrawal affecting the land, and that requirement is abolished by Secretarial Order No. 3040, of May 25, 1979, the decision will be set aside and the case remanded for action.

Bella Nova, 42 IBLA 59 (Aug. 2, 1979)

When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case. Where a Government mineral examiner testifies that he has examined a claim and found the quantity of minerals insufficient to support a finding of discovery, a prima facie case of invalidity has been established and the burden shifts to the claimants to show by a preponderance of the evidence that a discovery has been made. Government mineral examiners are not required to perform discovery work for a claimant or to explore beyond a claimant's workings.

The entire evidentiary record in a mining contest is considered and if evidence presented by a contestee is damaging to the contestee's case it may be used against the contestee regardless of any deficiencies in the Government's presentation. Therefore, regardless of whether the Government established a prima facie case of lack of discovery, if the entire record establishes that a discovery was not made on a claim it is properly declared null and void.

It was proper to deny mining claimants' request to redrill on mining claims after the land was withdrawn

ADMINISTRATIVE PROCEDURE--Continued

HEARINGS--Continued

from mining where the work would be an effort to make a discovery of a valuable mineral deposit within the claim rather than simply a confirmation or corroboration of a discovery prior to the withdrawal.

United States v. William Lavon Chappell et al., 42 IBLA 74 (Aug. 13, 1979)

The Board of Land Appeals has the discretion to grant a request for a hearing on issues of fact but, in order to warrant such a hearing, an appellant must at least allege facts which, if proved, would entitle him to the relief sought.

Mardelle M. Smith, Sherman C. Smith, 42 IBLA 136 (Aug. 16, 1979)

Where legal conclusions may be reached upon undisputed facts and there has been no proffer of further facts which could compel different legal conclusions, a request for a hearing is properly denied.

Sam Hanlon, Sr., 42 IBLA 161 (Aug. 17, 1979)

Where issues of material fact are in dispute, due process requires that, before a decision is reached to reject an application for an allotment, the applicant for a Native allotment be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and granted an opportunity for an oral hearing before a trier of fact where evidence and testimony of favorable witnesses may be submitted.

A hearing will be afforded to a Native allotment applicant to show his/her entitlement to a Native allotment in view of court decisions requiring hearings on Native allotment applications. Where the applicant requests a hearing and alleges there are factual disputes concerning abandonment and nonuse of the claim, although the showings on the application show nonuse of the land for a lengthy period of time sufficient ordinarily to constitute a prima facie case for rejection of the application, a hearing is nevertheless mandated.

Mildred Sparks, 42 IBLA 155 (Aug. 19, 1979)

Evidence offered on appeal from an initial decision by an administrative law judge after a hearing in a contest may not be considered or relied upon in making a final decision but may only be considered to determine if there should be a further hearing.

Joe I. Sanchez and Celina V. Sanchez, et al., 42 IBLA 176 (Aug. 22, 1979)

A hearing is properly ordered where there exist issues of fact the resolution of which will determine whether an oil and gas lease concluding its primary term was converted from rental status to royalty status. Appellant shall have the burden of proof to establish by a preponderance of the evidence (a) that the Dolezal-Government #1 well was capable of producing oil and gas in paying quantities on Oct. 31, 1978, or (b) that there was a discovery of oil or gas in paying quantities on lease W 15891 on Oct. 31, 1978. If either (or both) of these propositions is established, the subject lease was not subject to automatic termination by law for failure to make timely rental payment.

Coronado Oil Co., 42 IBLA 235 (Aug. 22, 1979)

ADMINISTRATIVE PROCEDURE--Continued

HEARINGS--Continued

Where an applicant for a Native allotment alleges for the first time on appeal his use and occupancy of lands prior to their withdrawal, a decision rejecting the Native's application shall be vacated and the case remanded to BLM for its consideration of appellant's new evidence.

Charles L. John, 42 IBLA 260 (Aug. 27, 1979)

A second hearing of a Government mining contest will not be afforded where a claimant was given notice and an opportunity to appear at a hearing, where he was actually present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result. A petition to reopen a hearing of a Government mining contest will be denied when the contestee offers no valid justification for the neglect to offer evidence which was or could have been available at the original hearing. A further hearing will not be ordered merely to afford a claimant an additional opportunity to explore and make a discovery.

United States v. Andy Syndbad, 42 IBLA 313 (Aug. 29, 1979)

A request for a hearing on a Native allotment application will be denied where no factual dispute exists and all issues are legal ones.

Betty J. Thompson, 43 IBLA 174 (Sept. 28, 1979)

JUDICIAL REVIEW

A party adversely affected by a final order or decision of an officer of the Conservation Division of the Geological Survey has a right to appeal to the Director, Geological Survey, unless the decision was approved by the Secretary or Director prior to promulgation.

A party adversely affected by a final decision of the Director, Geological Survey, had a right of appeal to the Board of Land Appeals in the Office of Hearings and Appeals, Office of the Secretary.

Phoenix Resources Co., 39 IBLA 153 (Jan. 29, 1979)

Where the holder of an oil and gas lease on the Outer Continental Shelf has filed a suit in a Federal district court to recover certain royalties paid under his lease, the Board of Land Appeals will affirm a decision of the Director, Geological Survey, holding in abeyance the lessee's request for a refund while the suit is pending.

Tenneco Oil Co., 41 IBLA 195 (June 22, 1979)

RULE MAKING

Where a mining claim is located after the enactment of the Federal Land Policy and Management Act of 1976 (Oct. 21, 1976), but before the date of promulgation of regulations implementing the statutory requirements of the Act relative to the recordation of mining claims, a regulation having retroactive effects may nonetheless be sustained in spite of such retroactivity if it is reasonable.

Elbert O. Jensen, 39 IBLA 62 (Jan. 17, 1979)

ADMINISTRATIVE PROCEDURE--Continued

RULE MAKING--Continued

The interpretation of an existing regulation by this Board to determine its applicability to the facts at hand does not constitute rulemaking by the Board.

H. R. Delasco, Inc., et al., 39 IBLA 194 (Feb. 2, 1979)

Neither a Recreation and Public Purposes Act classification nor a withdrawal is a rule or regulation within the ambit of the Secretarial policy of Apr. 27, 1971, which provides for utilization of the public participation procedures of 5 U.S.C. § 553 (1976).

Delmer McLean et al., 40 IBLA 34 (Mar. 15, 1979)

An interpretative rule is a clarification or explanation of an existing regulation, rather than a substantive modification thereof or the adoption of a new regulation.

Harry A. Zuckerman et al., 41 IBLA 372 (July 23, 1979)

STANDING

Where the State is a party to decisions by the Bureau of Land Management and the State's selection applications were rejected by those decisions, under 43 CFR 4.410, the State has standing to appeal those decisions to the Board of Land Appeals.

Under the "functional" standard to determine administrative standing set forth in Koniag, Inc. v. Andrus, 580 F.2d 601 (D.C. Cir. 1978), cert. denied, 99 S. Ct. 733 (1979), the State of Alaska has standing to challenge Native allotment applications conflicting with its selection applications even if the land is within a Native village selection area under the Alaska Native Claims Settlement Act. The State has standing under Departmental regulations to initiate private contests against such conflicting Native allotment applications.

State of Alaska et al., 41 IBLA 315 (July 11, 1979)
86 I.D. 361

The State of Alaska has a sufficient interest in land by virtue of its applications for an airport conveyance or by its selection application to have standing to initiate private contests against conflicting Native allotment applications.

State of Alaska, 42 IBLA 1 (July 25, 1979)

SUBSTANTIAL EVIDENCE

After holding a hearing pursuant to the Administrative Procedure Act, an administrative law judge may properly find that a person has committed a grazing trespass if that finding is in accordance with and supported by reliable, probative and substantial evidence.

Bureau of Land Management v. Holland Livestock Ranch et al., 39 IBLA 272 (Feb. 15, 1979) 86 I.D. 133

ALASKA

GENERALLY

Without adequate proof of a tender of a notice of location or application to purchase a headquarters site which was wrongfully denied by Bureau of Land Management personnel prior to a withdrawal of the land, the mere occupancy of land prior to the withdrawal did not create a "valid existing right" excepted from the effect of the withdrawal, and an application to purchase a headquarters site filed after the withdrawal is properly rejected.

Equitable adjudication of an application to purchase a headquarters site claim filed at least 8 years after the land has been withdrawn must be denied as substantial compliance with the law has not been made where neither occupancy of the site prior to the withdrawal nor after the withdrawal could validly be considered under the law.

Rene P. Lamoureux d/b/a Frenchy Lamoureux, 39 IBLA 36 (Jan. 15, 1979)

Where the State of Alaska has shown an interest in land in its existing airport, it may bring a private contest to challenge Native allotment applications for land in conflict with the airport.

State of Alaska, 40 IBLA 79 (Mar. 22, 1979)

The State of Alaska will be afforded time within which to bring private contests against Native allotment applications conflicting with an existing airport runway built by the State and to show it has standing to contest. If it does so timely, the Bureau of Land Management will adjudicate its standing as a contestant and the contests will proceed if it finds affirmatively. If not, the State's timely objections will be taken as a protest and a factfinding hearing will be held. If the State fails to take timely action, a decision rejecting its application to reinstate a conflicting airport lease application will stand.

State of Alaska, 40 IBLA 118 (Mar. 27, 1979)

Any right which may be gained under a notice of location for a trade and manufacturing site or a homesite, as required by the Act of Apr. 29, 1950, 43 U.S.C. § 687a-1 (1976), is personal to the party filing the notice.

A trade and manufacturing site notice of location not supported by actual settlement and occupancy authorized by 43 U.S.C. § 687a (1976) does not change the status of the public lands.

James Sims, 42 IBLA 231 (Aug. 22, 1979)

ALASKA NATIVE CLAIMS SETTLEMENT ACT

Whether the issuance of PLO No. 5448, prohibiting oil and gas leasing in Alaska, without prior proposed rulemaking is violative of the Administrative Procedure Act or of the Alaska Native Claims Settlement Act need not be decided; by such issuance the Secretary has enunciated a policy of rejecting mineral lease applications well within his discretionary authority.

Bristol Bay Native Corp., 41 IBLA 85 (June 4, 1979)

ALASKA--Continued

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

The Alaska Native Claims Settlement Act extinguished aboriginal occupancy claims of Alaska Natives; such claims cannot serve as a bar to a State selection, nor preclude the State from challenging Native allotment applications conflicting with its selection.

Under the "functional" standard to determine administrative standing set forth in Koniag, Inc. v. Andrus, 580 F.2d 601 (D.C. Cir. 1978), cert. denied, 99 S. Ct. 733 (1979), the State of Alaska has standing to challenge Native allotment applications conflicting with its selection applications even if the land is within a Native village selection area under the Alaska Native Claims Settlement Act. The State has standing under Departmental regulations to initiate private contests against such conflicting Native allotment applications.

State of Alaska et al., 41 IBLA 315 (July 11, 1979)
86 I.D. 361

The granting of a right-of-way under FLPMA and the superseded Acts of Feb. 15, 1901, and Mar. 4, 1911, is within the Secretary's discretion and neither the filing of the application nor the existence of improvements earns appellant a right to the right-of-way. No rights vest in the applicant until the grant is approved by the Secretary. An application for a right-of-way is properly rejected where the land is in an interim conveyance to a Native Corporation.

New England Fish Co., 42 IBLA 200 (Aug. 22, 1979)

GRAZING

Native occupancy and use commenced at a time when land is withdrawn from settlement, location, sale, or entry provides no basis for a Native allotment. Withdrawal of the land in 1940 by Exec. Order No. 8344, inclusion of the land in a grazing lease and homesite, and the subsequent selection of the land by the State of Alaska in 1966 have effectively kept the land closed to the initiation of rights under the Act of May 17, 1906, at all times during the period from 1940 to Dec. 18, 1971, when the Act was repealed by the Alaska Native Claims Settlement Act.

Although the Department has adhered to the principle of protecting Indian occupancy on public lands, it also has the responsibility of protecting rights of others to public land tenure, including persons who have been granted grazing leases under the Alaska Grazing Act of Mar. 4, 1927, as amended, 43 U.S.C. §§ 316, 316a-316o (1976).

Milton R. Pagano, 41 IBLA 214 (June 27, 1979)

Native use and occupancy commenced at a time when land is otherwise appropriated and segregated from such use and occupancy provides no basis for a claim under the Act of May 17, 1906. Inclusion of the subject lands in 1932 in a grazing lease, withdrawal of the lands in 1940, selection of the lands in 1967 by the State of Alaska, and subsequent withdrawals in 1973 pursuant to the Alaska Native Claims Settlement Act have effectively kept the lands closed to the initiation of rights under the Act of May 17, 1906, at all times during the period from 1932 to Dec. 18, 1971, when the Act was repealed by sec. 18 of the Alaska Native Claims Settlement Act.

Although the Department has adhered to the principle of protecting Indian occupancy on public lands, it also has the responsibility of protecting rights of others

ALASKA--Continued

GRAZING--Continued

to public land tenure, including persons who have been granted grazing leases under the Alaska Grazing Act of Mar. 4, 1927, as amended, 43 U.S.C. §§ 316, 316a-316o (1976).

Magnel E. Drabek, 41 IBLA 219 (June 27, 1979)

Withdrawal of land in 1940, inclusion of the land in a grazing lease under authority of the Alaska Grazing Act of Mar. 4, 1927, revocation of the withdrawal in 1961, and selection of the land by the State of Alaska under authority of the Statehood Act in 1963 effectively kept the land closed to the initiation of rights under the Native Allotment Act at all times during the period from 1940 to the revocation of the Allotment Act on Dec. 18, 1971, by sec. 18 of the Alaska Native Claims Settlement Act.

Norman Opheim, Billy Boskofsky, Jr. (As Heir of Nicholas Boskofsky), 41 IBLA 338 (July 11, 1979)

HEADQUARTERS SITES

Without adequate proof of a tender of a notice of location or application to purchase a headquarters site which was wrongfully denied by Bureau of Land Management personnel prior to a withdrawal of the land, the mere occupancy of land prior to the withdrawal did not create a "valid existing right" excepted from the effect of the withdrawal, and an application to purchase a headquarters site filed after the withdrawal is properly rejected.

Equitable adjudication of an application to purchase a headquarters site claim filed at least 8 years after the land has been withdrawn must be denied as substantial compliance with the law has not been made where neither occupancy of the site prior to the withdrawal nor after the withdrawal could validly be considered under the law.

That part of a decision rejecting a headquarters site purchase application which requires the applicant to remove his improvements from the site within 90 days may be set aside and the case remanded to the Alaska State Office to determine whether a temporary use permit can be granted authorizing continued use of the improvements.

Rene P. Lamoureux d/b/a Frenchy Lamoureux, 39 IBLA 36 (Jan. 15, 1979)

An entryman may not take advantage of sec. 7 of the Act of Mar. 3, 1891, entitling an entryman to a patent after 2 years from date of issuance of a receiver's receipt when there is no pending contest or protest against the validity of the entry, where he has not shown that preconditions of the Act have been met, i.e., making the final payments required.

In a contest proceeding the Government has the burden of establishing a prima facie case of noncompliance with the requirements for trade and manufacturing, and headquarters sites. The burden then shifts to the applicant to show by a preponderance of the evidence that he has used, occupied, and improved the sites for trade, manufacture, or other productive industry.

A claimant of a trade and manufacturing site must show that at the time of filing his application to purchase he was engaged in trade, manufacture, or other productive industry in connection with the sites. While it is not necessary for the claimant to show that all functions of the business were carried on at the site, he must show a bona fide commercial enterprise from which he reasonably hoped to derive a profit; mere

ALASKA--Continued

HEADQUARTERS SITES--Continued

preparation for a prospective business is not sufficient under the regulations. A claimant for a headquarters site must also be engaged in such a business or be an employee of such a business.

United States v. Jack Zenny Boyd, Jr., 39 IBLA 321 (Feb. 27, 1979)

Applicant has burden of establishing entitlement to headquarters site claim, and must demonstrate that he has complied with statute and regulations.

In contest hearing on headquarters site claim, a contestee, to prevail, must submit evidence from which it can be concluded that he was engaged in an actual business operation from which he reasonably hoped to derive a profit, or is an employee of a qualified business.

Where evidence showed that in 5 years during which applicant was allowed to prove up headquarters site applicant realized $152 from trapping, and where other claimed uses were construction of runways and base camp for hunting and fishing parties, but there was no clear information as to extent of operations or returns derived from these uses, administrative law judge properly rejected application to purchase headquarters site under 43 U.S.C. § 687a (1970).

United States v. Henry Jay Bush, 40 IBLA 106 (Mar. 27, 1979)

Any right which may be gained under a notice of location for a trade and manufacturing site or a homesite, as required by the Act of Apr. 29, 1950, 43 U.S.C. § 687a-1 (1976), is personal to the party filing the notice.

James Sims, 42 IBLA 231 (Aug. 22, 1979)

HOMESITES

Native occupancy and use commenced at a time when land is withdrawn from settlement, location, sale, or entry provides no basis for a Native allotment. Withdrawal of the land in 1940 by Exec. Order No. 8344, inclusion of the land in a grazing lease and homesite, and the subsequent selection of the land by the State of Alaska in 1966 have effectively kept the land closed to the initiation of rights under the Act of May 17, 1906, at all times during the period from 1940 to Dec. 18, 1971, when the Act was repealed by the Alaska Native Claims Settlement Act.

Although the Department has adhered to the principle of protecting Indian occupancy on public lands, it also has the responsibility of protecting rights of others to public land tenure, including persons who have been granted grazing leases under the Alaska Grazing Act of Mar. 4, 1927, as amended, 43 U.S.C. §§ 316, 316a-316o (1976).

Milton R. Pagano, 41 IBLA 214 (June 27, 1979)

Any right which may be gained under a notice of location for a trade and manufacturing site or a homesite, as required by the Act of Apr. 29, 1950, 43 U.S.C. § 687a-1 (1976), is personal to the party filing the notice.

James Sims, 42 IBLA 231 (Aug. 22, 1979)

ALASKA--Continued

HOMESTEADS

A summary dismissal of a private contest against an Alaska homestead becomes a final administrative ruling on that contest when the contestant, instead of appealing the dismissal, files a second contest which must be considered an entirely new action. When a final departmental adjudication has been made, the doctrine of administrative finality, which is the administrative counterpart of the principle of res judicata, generally bars consideration of a new appeal arising from a later proceeding involving the same homestead and the same issue.

A private contest brought against an Alaska homestead charging that the entryman had failed to meet any of the residence or cultivation requirements of the law must be dismissed where the statutory life of the entry has previously expired without the entryman filing final proof and information was already of record in the BLM office that the entryman had done nothing during the life of the entry to perfect the claim. 43 CFR 4.450-1.

Joe O. Amberger, 43 IBLA 178 (Sept. 28, 1979)

INDIAN AND NATIVE AFFAIRS

Settlement on land in Alaska which is subject to a grazing lease issued under the Alaska Grazing Act of Mar. 4, 1927, 43 U.S.C. §§ 316, 316a-316o (1976), does not create any rights by virtue of such settlement under the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 to 270-3 (1970), repealed by 43 U.S.C. § 1617 (1976), since such land is segregated from adverse appropriation at least until the Department takes action to cancel the grazing lease pro tanto, but the grazing lease does not preclude the filing of a State selection application which, when filed, segregates the land from all appropriation based upon settlement or location.

Floyd L. Anderson, Sr., 41 IBLA 280 (June 28, 1979)
86 I.D. 345

Withdrawal of land in 1940, inclusion of the land in a grazing lease under authority of the Alaska Grazing Act of Mar. 4, 1927, revocation of the withdrawal in 1961, and selection of the land by the State of Alaska under authority of the Statehood Act in 1963 effectively kept the land closed to the initiation of rights under the Native Allotment Act at all times during the period from 1940 to the revocation of the Allotment Act on Dec. 18, 1971, by sec. 18 of the Alaska Native Claims Settlement Act.

Norman Opheim, Billy Boskofsky, Jr. (As Heir of Nicholas Boskofsky), 41 IBLA 338 (July 11, 1979)

LAND GRANTS AND SELECTIONS

Generally

Where there is a conflict between an application by the State of Alaska to select land under the Statehood Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to BLM that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may not appeal from the "Notice," which is interlocutory, but it may initiate private contest proceedings to prove lack of qualification on the part of the Native, or it may appeal the subsequent decision of BLM to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient it will

ALASKA--Continued

LAND GRANTS AND SELECTIONS--Continued

Generally--Continued

order the institution of Government contest proceedings, but if it finds the allotment application acceptable, it will order the patent issued, if all else be regular.

State of Alaska, 41 IBLA 309 (July 5, 1979)

The Alaska Native Claims Settlement Act extinguished aboriginal occupancy claims of Alaska Natives; such claims cannot serve as a bar to a State selection, nor preclude the State from challenging Native allotment applications conflicting with its selection.

Under the "functional" standard to determine administrative standing set forth in Koniag, Inc. v. Andrus, 580 F.2d 601 (D.C. Cir. 1978), cert. denied, 99 S. Ct. 733 (1979), the State of Alaska has standing to challenge Native allotment applications conflicting with its selection applications even if the land is within a Native village selection area under the Alaska Native Claims Settlement Act. The State has standing under Departmental regulations to initiate private contests against such conflicting Native allotment applications.

State of Alaska selection applications should not be rejected because of conflicts with Native allotment applications which are to be approved without first affording the State notice of such action to be taken and an opportunity to contest the conflicting claims if it desires.

State of Alaska et al., 41 IBLA 315 (July 11, 1979)
86 I.D. 361

The State of Alaska has a sufficient interest in land by virtue of its applications for an airport conveyance or by its selection application to have standing to initiate private contests against conflicting Native allotment applications.

State of Alaska applications for prior-filed airport conveyances of land needed for an existing airport should not be rejected because of conflicts with Native allotment applications which are to be approved without first affording the State notice of such action to be taken and an opportunity to contest the conflicting claims if it desires.

State of Alaska, 42 IBLA 1 (July 25, 1979)

Where there is a conflict between an application by the State of Alaska to select land under the Statehood Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to BLM that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may not appeal from an interlocutory decision which authorizes the State to initiate private contest proceedings to prove lack of qualification on the part of the Native. Rather, it may initiate the private contest within the time period prescribed, or it may appeal the decision of BLM, after it becomes final, to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient it will order the institution of Government contest proceedings, but if it finds the allotment application acceptable, it will order the patent issued, if all else be regular.

Where it appears that a party did not realize that an election of remedies was mandated by Departmental procedures, a decision requiring the initiation of a private contest will be set aside, and the party will be permitted a period of time in which to initiate a private contest, or alternatively, waive such private contest

ALASKA--Continued

LAND GRANTS AND SELECTIONS--Continued

Generally--Continued

and pursue a direct appeal on the question of whether a Government contest should issue.

State of Alaska et al., 42 IBLA 94 (Aug. 16, 1979)

"Public Lands." Land within an interim conveyance to a Native Corporation is no longer "public land" under the Federal Land Policy and Management Act nor subject to Bureau of Land Management jurisdiction to issue rights-of-way under that Act.

New England Fish Co., 42 IBLA 200 (Aug. 22, 1979)

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of an application by State of Alaska to select lands segregates those lands from all subsequent appropriations, including locations under the mining law. A mining claim located on land which has been segregated and closed to mineral entry is properly declared null and void ab initio.

John C. Schandelmeier, 42 IBLA 240 (Aug. 22, 1979)

Where there is a conflict between an application by the State of Alaska to select land under the Alaska Mental Health Enabling Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to the Bureau of Land Management that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may initiate private contest proceedings to prove lack of qualification on the part of the Native, or it may appeal the determination to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient, it will order the institution of Government contest proceedings. If, however, the Board affirms the finding that the requirements of patent have been met, the State will have no further administrative recourse. Where the State had not, prior to its appeal, been afforded notice of the election, it should be afforded an opportunity to make such election.

A selection filed by the State of Alaska is subject to prior valid existing rights of Natives, irrespective of whether the State selection was filed pursuant to the Alaska Mental Health Enabling Act or the Statehood Act.

State of Alaska v. Mattie B. Bartos, 42 IBLA 269 (Aug. 27, 1979)

State of Alaska v. Daniel Johnson, 42 IBLA 370 (Sept. 11, 1979) 86 I.D. 441

Applications

Settlement on land in Alaska which is subject to a grazing lease issued under the Alaska Grazing Act of Mar. 4, 1927, 43 U.S.C. §§ 316, 316a-316o (1976), does not create any rights by virtue of such settlement under the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 to 270-3 (1970), repealed by 43 U.S.C. § 1617 (1976), since such land is segregated from adverse appropriation at least until the Department takes action to cancel the grazing lease pro tanto, but the grazing lease does not preclude the filing of a State selection application which, when filed, segregates the land from all appropriation based upon settlement or location.

Floyd L. Anderson, Sr., 41 IBLA 280 (June 28, 1979)
86 I.D. 345

ALASKA--Continued

LAND GRANTS AND SELECTIONS--Continued

Mental Health Lands

A selection filed by the State of Alaska is subject to prior valid existing rights of Natives, irrespective of whether the State selection was filed pursuant to the Alaska Mental Health Enabling Act or the Statehood Act.

State of Alaska v. Mattie B. Bartos, 42 IBLA 269 (Aug. 27, 1979)

State of Alaska v. Daniel Johnson, 42 IBLA 370 (Sept. 11, 1979) 86 I.D. 441

MINERAL LEASES AND PERMITS

Whether the issuance of PLO No. 5448, prohibiting oil and gas leasing in Alaska, without prior proposed rulemaking is violative of the Administrative Procedure Act or of the Alaska Native Claims Settlement Act need not be decided; by such issuance the Secretary has enunciated a policy of rejecting mineral lease applications well within his discretionary authority.

Bristol Bay Native Corp., 41 IBLA 85 (June 4, 1979)

NATIVE ALLOTMENTS

Where the State of Alaska has shown an interest in land in its existing airport, it may bring a private contest to challenge Native allotment applications for land in conflict with the airport.

State of Alaska, 40 IBLA 79 (Mar. 22, 1979)

The State of Alaska will be afforded time within which to bring private contests against Native allotment applications conflicting with an existing airport runway built by the State and to show it has standing to contest. If it does so timely, the Bureau of Land Management will adjudicate its standing as a contestant and the contests will proceed if it finds affirmatively. If not, the State's timely objections will be taken as a protest and a factfinding hearing will be held. If the State fails to take timely action, a decision rejecting its application to reinstate a conflicting airport lease application will stand.

State of Alaska, 40 IBLA 118 (Mar. 27, 1979)

Alaska Natives who allege substantial use and occupancy of vacant, unappropriated, and unreserved public land in Alaska for a period of at least 5 years pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970), and the regulations at 43 CFR Subpart 2561 are entitled to notice and an opportunity for a hearing prior to rejection of their application. Such notice shall specify the reasons for the proposed rejection. Claimant shall have an opportunity to present evidence and testimony of favorable witnesses at a hearing before the trier of fact prior to a decision.

Where the Bureau of Land Management determines that an Alaska Native allotment application should be rejected because the land was not used and occupied by the applicant, the BLM shall issue a contest complaint pursuant to 43 CFR 4.451 et seq. Upon receiving a timely answer to the complaint, which answer raises a disputed issue of material fact, the Bureau will forward the case file to the Hearings Division, Office of Hearings and Appeals, Department of the Interior, for assignment of an administrative law judge, who will proceed to

NATIVE ALLOTMENTS--Continued

schedule a hearing, at which the applicant may produce evidence to establish entitlement to his allotment.

John Moore et al., 40 IBLA 321 (Apr. 30, 1979) 86 I.D. 279

When an Alaska Native allotment applicant alleges that there has been substantial use and occupancy of vacant, unappropriated, and unreserved public land in Alaska for a period of at least 5 years pursuant to 43 U.S.C. §§ 270-1 to 270-3 (1970) and 43 CFR Subpart 2561, and the Bureau of Land Management determines the application should be rejected because the land was not so used and occupied, the Native is entitled under contest procedures, 43 CFR 4.451, to notice and an opportunity for a hearing prior to rejection of his application.

Mary Bobby, 41 IBLA 44 (May 29, 1979)

Rika Murphy, Gene H. Smagge, 42 IBLA 51 (July 31, 1979)

The substantial use and occupancy required by the Native Allotment Act must be achieved by the Native as an independent citizen for himself (or as head of a family) and not as a minor, dependent child occupying or using the land in the company of his parents. This does not mean that a minor may not establish qualifying use or occupancy--the issue is the nature of the use and occupancy. It must be achieved by an independent citizen in his own right and it must be at least potentially exclusive of others.

Where an applicant for an Alaska Native allotment was a minor at the time she alleges the initial use and occupancy of the land, but not so young as to preclude any possibility that she was then capable of doing so as an independent citizen in her own right to the potential exclusion of others, prior to rejection of her application on the basis of her youth BLM should provide notice and an opportunity for hearing.

Nellie Boswell Beecroft, 41 IBLA 70 (May 31, 1979)

Where issues of material fact are in dispute, due process requires that an applicant for a Native allotment be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment.

Where Bureau of Land Management determines an application for a Native allotment should be rejected for failure to establish use and occupancy of the land, Bureau of Land Management should initiate a contest proceeding pursuant to 43 CFR 4.451 et seq.

Frederick Phillips et al., 41 IBLA 169 (June 22, 1979)

The Department has determined that an official of the Bureau of Indian Affairs is not entitled to represent a Native allotment applicant in an appeal to the Board of Land Appeals. However, where the case involves the propriety of proofs submitted by the Bureau of Indian Affairs in behalf of a deceased Native allotment applicant, that issue may be resolved.

Where a Native allotment application is filed before the death of an applicant, proof of the applicant's use and occupancy, if otherwise timely, may be filed by the appropriate official of the Bureau of Indian Affairs pursuant to 43 CFR 2561.2(a) after the applicant's death. A decision rejecting the application

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

because the proof was filed after the applicant's death must be set aside where the proof is not inconsistent with the application. Further proceedings must be served upon the heirs, known or unknown, by appropriate service, and also upon conflicting claimants, such as the State of Alaska.

Ernest L. Olson, Jr. (Deceased), 41 IBLA 179 (June 22, 1979)

Where the Bureau of Land Management (BLM) determines that an Alaska Native allotment application should be rejected in part because the Native did not use all of the land applied for, the BLM shall initiate a contest proceeding pursuant to 43 CFR 4.451 et seq.

Federal title to land may be lost by erosion, and land which has become submerged under water is no longer subject to disposition under the Alaska Native Allotment Act. The fact that an Alaska Native may have used, occupied, and filed an application for such land when it was dry does not prevent the loss of Federal title to that land by erosion. Neither the Alaska Statehood Act nor the Submerged Lands Act prevents the passage of title to such land to the State.

Frank Rulland, 41 IBLA 207 (June 27, 1979) 86 I.D. 342

Native occupancy and use commenced at a time when land is withdrawn from settlement, location, sale, or entry provides no basis for a Native allotment. Withdrawal of the land in 1940 by Exec. Order No. 8344, inclusion of the land in a grazing lease and homesite, and the subsequent selection of the land by the State of Alaska in 1966 have effectively kept the land closed to the initiation of rights under the Act of May 17, 1906, at all times during the period from 1940 to Dec. 18, 1971, when the Act was repealed by the Alaska Native Claims Settlement Act.

Although the Department has adhered to the principle of protecting Indian occupancy on public lands, it also has the responsibility of protecting rights of others to public land tenure, including persons who have been granted grazing leases under the Alaska Grazing Act of Mar. 4, 1927, as amended, 43 U.S.C. §§ 316, 316a-316o (1976).

Milton R. Pagano, 41 IBLA 214 (June 27, 1979)

Native use and occupancy commenced at a time when land is otherwise appropriated and segregated from such use and occupancy provides no basis for a claim under the Act of May 17, 1906. Inclusion of the subject lands in 1932 in a grazing lease, withdrawal of the lands in 1940, selection of the lands in 1967 by the State of Alaska, and subsequent withdrawals in 1973 pursuant to the Alaska Native Claims Settlement Act have effectively kept the lands closed to the initiation of rights under the Act of May 17, 1906, at all times during the period from 1932 to Dec. 18, 1971, when the Act was repealed by sec. 18 of the Alaska Native Claims Settlement Act.

Although the Department has adhered to the principle of protecting Indian occupancy on public lands, it also has the responsibility of protecting rights of others to public land tenure, including persons who have been granted grazing leases under the Alaska Grazing Act of Mar. 4, 1927, as amended, 43 U.S.C. §§ 316, 316a-316o (1976).

Magnel E. Drabek, 41 IBLA 219 (June 27, 1979)

NATIVE ALLOTMENTS--Continued

The Alaska Native Allotment Act authorizes a nonalienable, nontransferable, and noninheritable right of selection which terminates upon death. Only when an allotment selection has been made by the filing of an acceptable application for public land open to such application and the applicant had used and occupied the land for not less than 5 years in his lifetime is the preference right to an allotment earned and an inheritable right established. A Native who applies for withdrawn lands must show that he himself complied with the law prior to the date of withdrawal. No Native may avail himself of any period of use and occupancy by his ancestors to establish a right to an allotment. Where a Native was born after lands were withdrawn, the application must be rejected.

Arthur R. Martin et al., 41 IBLA 224 (June 27, 1979)

A Native allotment applicant, who was 5 years old at the time when the land was withdrawn from all forms of appropriation, is properly deemed to be incapable as a matter of law of having exerted independent use and occupancy of the land to the exclusion of others prior to the withdrawal and consequently the allotment application is properly rejected.

An allotment right is personal to one who has complied with the laws and regulations. An applicant for a Native allotment may not rely or tack on use and occupancy of the land by his ancestors to establish his right.

Floyd L. Anderson, Sr., 41 IBLA 280 (June 28, 1979) 86 I.D. 345

A grazing lease issued under the Alaska Grazing Act, 43 U.S.C. § 316 et seq. (1970), appropriates the lands and segregates them from the public domain, barring them from use and occupancy for Native allotment purposes until the Department takes action to exclude lands from the lease.

The substantial use and occupancy as required by the Native Allotment Act must be by the Native independently for himself or as head of a family prior to the effective date of withdrawal, and he may not tack on use and occupancy by his parents or ancestors to establish a right for himself prior to the withdrawal.

Herman Anderson, Jr., Nicholas Pestrikoff, Anthony Drabek, 41 IBLA 296 (June 29, 1979)

Where there is a conflict between an application by the State of Alaska to select land under the Statehood Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to BLM that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may not appeal from the "Notice," which is interlocutory, but it may initiate private contest proceedings to prove lack of qualification on the part of the Native, or it may appeal the subsequent decision of BLM to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient it will order the institution of Government contest proceedings, but if it finds the allotment application acceptable, it will order the patent issued, if all else be regular.

State of Alaska, 41 IBLA 309 (July 5, 1979)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

The Alaska Native Claims Settlement Act extinguished aboriginal occupancy claims of Alaska Natives; such claims cannot serve as a bar to a State selection, nor preclude the State from challenging Native allotment applications conflicting with its selection.

Under the "functional" standard to determine administrative standing set forth in Koniag, Inc. v. Andrus, 580 F.2d 601 (D.C. Cir. 1978), cert. denied, 99 S. Ct. 733 (1979), the State of Alaska has standing to challenge Native allotment applications conflicting with its selection applications even if the land is within a Native village selection area under the Alaska Native Claims Settlement Act. The State has standing under Departmental regulations to initiate private contests against such conflicting Native allotment applications.

State of Alaska selection applications should not be rejected because of conflicts with Native allotment applications which are to be approved without first affording the State notice of such action to be taken and an opportunity to contest the conflicting claims if it desires.

State of Alaska et al., 41 IBLA 315 (July 11, 1979)
86 I.D. 361

The substantial use and occupancy as required by the Native Allotment Act must be by the Native himself prior to the effective date of withdrawal, and he may not tack on use and occupancy by his parents or ancestors to establish a right for himself prior to the withdrawal.

Withdrawal of land in 1940, inclusion of the land in a grazing lease under authority of the Alaska Grazing Act of Mar. 4, 1927, revocation of the withdrawal in 1961, and selection of the land by the State of Alaska under authority of the Statehood Act in 1963 effectively kept the land closed to the initiation of rights under the Native Allotment Act at all times during the period from 1940 to the revocation of the Allotment Act on Dec. 18, 1971, by sec. 18 of the Alaska Native Claims Settlement Act.

Norman Opheim, Billy Boskofsky, Jr. (As Heir of Nicholas Boskofsky), 41 IBLA 338 (July 11, 1979)

Where an applicant for a Native allotment alleges use and occupancy of lands which had previously been withdrawn in accordance with sec. 24, Federal Water Power Act of June 10, 1920, an application is properly denied despite the fact that a public land order designating the area a powersite classification is issued subsequent to the applicant's commencement of use and occupancy. Lands included in an application for powersite development under the Act shall from the date of filing of the application be reserved from entry, location, or other disposal under the laws of the United States, unless otherwise directed by the Federal Power Commission or by Congress.

A request for a hearing on a Native allotment application will be denied where there are no facts in dispute and the sole question is a legal issue.

Lindberg Alexander, 41 IBLA 382 (July 23, 1979)

The State of Alaska has a sufficient interest in land by virtue of its applications for an airport conveyance or by its selection application to have standing to initiate private contests against conflicting Native allotment applications.

State of Alaska applications for prior-filed airport conveyances of land needed for an existing airport should not be rejected because of conflicts with Native

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

allotment applications which are to be approved without first affording the State notice of such action to be taken and an opportunity to contest the conflicting claims if it desires.

State of Alaska, 42 IBLA 1 (July 25, 1979)

The substantial use and occupancy required under the Native Allotment Act must be achieved by the Native himself as an independent citizen (or family head) and such use must be at least potentially exclusive of others. Although a minor may initiate such use and occupancy, use and occupancy by a dependent accompanied by his parents does not qualify.

Where a Native allotment application has been rejected, based on the guidelines of Oct. 18, 1973, on the basis that the applicant had not demonstrated 5 years use and occupancy of the land prior to the withdrawal affecting the land, and that requirement is abolished by Secretarial Order No. 3040, of May 25, 1979, the decision will be set aside and the case remanded for action.

Bella Nova, 42 IBLA 59 (Aug. 2, 1979)

Withdrawn lands are not open to appropriation under the Native Allotment Act. Appellant's settlement upon a tract of land withdrawn from entry is a trespass, and such settlement does not provide a basis for any claim to the land.

Publication in the Federal Register of PLO No. 3432 withdrawing certain lands in Alaska from all forms of appropriation under the public land laws, except leasing under the mineral leasing laws, gives valid notice of its contents.

Elizabeth J. Martini, 42 IBLA 82 (Aug. 13, 1979)

Where BLM fails to show that there was service of a decision rejecting an Alaska Native allotment and the applicant learns of his rejection 4-1/2 years after rejection, the applicant may file a timely appeal within 30 days of notice of the decision.

Mailing to the Bureau of Indian Affairs a carbon copy of a decision rejecting an application for an Alaska Native allotment is not service upon the applicant so as to comply with 43 CFR 4.401.

Gust J. Reft, Sr., 42 IBLA 86 (Aug. 13, 1979)

The relaxed procedural rules relating to the filing of statements of reasons for appeal in Native allotment cases enunciated in the letter of Sept. 24, 1975, and extended in the order of Nov. 26, 1976, IBLA 76-715, are hereby revoked. All future requests for extensions of time must comport with the regulations found at 43 CFR 4.22(f)(2).

Where, in a decision holding a Native allotment for approval and a State selection for rejection to the extent of a conflict, the Bureau of Land Management grants the State 30 days to initiate a private contest challenging the Native allotment, the 30-day appeal period will commence upon expiration of the 30 days accorded the State for initiation of a private contest and not with receipt of the decision.

Where there is a conflict between an application by the State of Alaska to select land under the Statehood Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to BLM that the Native applicant has met the requirements for patent, upon notice of this determination the State, if

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

dissatisfied, has an election of remedies. It may not appeal from an interlocutory decision which authorizes the State to initiate private contest proceedings to prove lack of qualification on the part of the Native. Rather, it may initiate the private contest within the time period prescribed, or it may appeal the decision of BLM, after it becomes final, to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient it will order the institution of Government contest proceedings, but if it finds the allotment application acceptable, it will order the patent issued, if all else be regular.

Where it appears that a party did not realize that an election of remedies was mandated by Departmental procedures, a decision requiring the initiation of a private contest will be set aside, and the party will be permitted a period of time in which to initiate a private contest, or alternatively, waive such private contest and pursue a direct appeal on the question of whether a Government contest should issue.

State of Alaska et al., 42 IBLA 94 (Aug. 16, 1979)

An allotment right is personal to one who has fully complied with the law and regulations and an applicant for a Native allotment may not tack on ancestral use and occupancy of the land to establish his right thereto. Ancestral use of the land while open to settlement does not create any right that excepts the land from a withdrawal in favor of an applicant who may have initiated use and occupancy subsequent to the withdrawal.

Sam Hanlon, Sr., 42 IBLA 161 (Aug. 17, 1979)

Where issues of material fact are in dispute, due process requires that, before a decision is reached to reject an application for an allotment, the applicant for a Native allotment be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and granted an opportunity for an oral hearing before a trier of fact where evidence and testimony of favorable witnesses may be submitted.

The nonuse of land within a Native allotment application for a period of time is relevant to the issues of abandonment of the claim, and whether there have been substantially continuous use and occupancy as required by the law. Such nonuse or highly limited and intermittent use also affords a basis for rejecting an application in the exercise of the Secretary's discretion where such nonuse or highly limited and intermittent use demonstrates the land is not needed by the Native and that the purpose of the Native Allotment Act to secure land actually used and occupied by the Native for his/her needs has not been met.

A hearing will be afforded to a Native allotment applicant to show his/her entitlement to a Native allotment in view of court decisions requiring hearings on Native allotment applications. Where the applicant requests a hearing and alleges there are factual disputes concerning abandonment and nonuse of the claim, although the showings on the application show nonuse of the land for a lengthy period of time sufficient ordinarily to constitute a prima facie case for rejection of the application, a hearing is nevertheless mandated.

Mildred Sparks, 42 IBLA 155 (Aug. 19, 1979)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

Selection of the land by the State of Alaska under authority of the Statehood Act in 1962, effectively kept the land closed to the initiation of rights under the Native Allotment Act at all times during the period from 1962 to the revocation of the Allotment Act on Dec. 18, 1971, by sec. 18 of the Alaska Native Claims Settlement Act.

James Sims, 42 IBLA 231 (Aug. 22, 1979)

Lands included in an application for powersite development under the Federal Power Act of June 10, 1920, 16 U.S.C. § 818 (1976), shall from the date of filing of the application be reserved from entry, location, or other disposal under the laws of the United States, unless otherwise directed by the Federal Power Commission or by Congress.

Where an applicant for a Native allotment alleges for the first time on appeal his use and occupancy of lands prior to their withdrawal, a decision rejecting the Native's application shall be vacated and the case remanded to BLM for its consideration of appellant's new evidence.

Charles L. John, 42 IBLA 260 (Aug. 27, 1979)

Where there is a conflict between an application by the State of Alaska to select land under the Alaska Mental Health Enabling Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to the Bureau of Land Management that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may initiate private contest proceedings to prove lack of qualification on the part of the Native, or it may appeal the determination to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient, it will order the institution of Government contest proceedings. If, however, the Board affirms the finding that the requirements of patent have been met, the State will have no further administrative recourse. Where the State had not, prior to its appeal, been afforded notice of the election, it should be afforded an opportunity to make such election.

A selection filed by the State of Alaska is subject to prior valid existing rights of Natives, irrespective of whether the State selection was filed pursuant to the Alaska Mental Health Enabling Act or the Statehood Act.

State of Alaska v. Mattie B. Bartos, 42 IBLA 269 (Aug. 27, 1979)

State of Alaska v. Daniel Johnson, 42 IBLA 370 (Sept. 11, 1979) 86 I.D. 441

Where issues of material fact are in dispute, due process requires that an applicant for a Native allotment be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment.

Where Bureau of Land Management determines an application for a Native allotment should be rejected for failure to establish use and occupancy of the land, Bureau of Land Management should initiate a contest proceeding pursuant to 43 CFR 4.451 et seq.

A decision rejecting a Native allotment application because there was not 5 years of use and occupancy of the land prior to a withdrawal affecting the land, will be

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

set aside and the case remanded to the Bureau of Land Management for readjudication in accordance with Secretarial Order No. 3040 of May 25, 1979, which rescinds a former guideline requiring the 5 years prior to the withdrawal and now permits allotment after 5 years' use and occupancy has been completed provided the applicant had either filed an application or commenced use and occupancy prior to a withdrawal.

Ella S. Sheldon et al., 42 IBLA 276 (Aug. 27, 1979)

The Department of the Interior is only authorized to approve Native allotment applications which were pending before the Department on Dec. 18, 1971. If an applicant provides satisfactory evidence that he had delivered his application before that time to the agency office of the Bureau of Indian Affairs which held it past the time when it should have been filed with the Bureau of Land Management, the application may be adjudicated as having been timely filed.

William Yurioff, Gust K. Wahl, Charlie Chocknok, Olia Oyaluk, 43 IBLA 14 (Sept. 11, 1979)

An allotment right is personal to one who has complied with the laws and regulations. An applicant for a Native allotment may not rely on or tack on use and occupancy of the land by his ancestors to establish his right.

A Native allotment applicant, who was 5 years old at the time when the land was withdrawn from all forms of appropriation, is properly deemed to be incapable as a matter of law of having exerted independent use and occupancy of the land to the exclusion of others prior to the withdrawal and consequently the allotment application is properly rejected.

Public Land Order No. 2213 of Dec. 8, 1960, establishing the Kuskokwim National Wildlife Range withdrew certain lands from all forms of appropriation under the public land laws, and although such order preserved to Natives the right to hunt, fish, and trap thereon, the lands were no longer subject to initiation of rights under the Native Allotment Act once the order became effective.

Peter Panruk, 43 IBLA 69 (Sept. 19, 1979)

The Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976), repealed the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970), with the exception of applications pending on Dec. 18, 1971. A State Office decision rejecting a Native allotment application for an additional parcel of land filed pursuant to the Act of May 17, 1906, after Dec. 18, 1971, will be affirmed. Equitable adjudication, which requires substantial compliance with the law, will not be invoked where there is no evidence that such an application was timely filed with BIA.

Nora L. Sanford, 43 IBLA 74 (Sept. 19, 1979)

The substantial use and occupancy as required by the Native Allotment Act must be by the Native herself prior to the effective date of withdrawal, and she may not tack on use and occupancy by her parents or ancestors to establish a right for herself prior to the withdrawal.

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

A recreation and public purposes classification, issued pursuant to the Recreation Act of 1926, as amended, 43 U.S.C. § 869 (1976), segregates Alaskan lands from Native allotment applications until such time as the classification is revoked.

A request for a hearing on a Native allotment application will be denied where no factual dispute exists and all issues are legal ones.

Under Secretarial Order No. 3040, it is sufficient if the 5 years' use and occupancy, required under the Native Allotment Act, is completed prior to the granting of the allotment, providing applicant either filed for his allotment or commenced use and occupancy prior to the withdrawal.

Betty J. Thompson, 43 IBLA 174 (Sept. 28, 1979)

NAVIGABLE WATERS

Federal title to land may be lost by erosion, and land which has become submerged under water is no longer subject to disposition under the Alaska Native Allotment Act. The fact that an Alaska Native may have used, occupied, and filed an application for such land when it was dry does not prevent the loss of Federal title to that land by erosion. Neither the Alaska Statehood Act nor the Submerged Lands Act prevents the passage of title to such land to the State.

Frank Rulland, 41 IBLA 207 (June 27, 1979) 86 I.D. 342

POSSESSORY RIGHTS

An allotment right is personal to one who has fully complied with the law and regulations and an applicant for a Native allotment may not tack on ancestral use and occupancy of the land to establish his right thereto. Ancestral use of the land while open to settlement does not create any right that excepts the land from a withdrawal in favor of an applicant who may have initiated use and occupancy subsequent to the withdrawal.

Sam Hanlon, Sr., 42 IBLA 161 (Aug. 17, 1979)

A trade and manufacturing site notice of location not supported by actual settlement and occupancy authorized by 43 U.S.C. § 687a (1976) does not change the status of the public lands.

James Sims, 42 IBLA 231 (Aug. 22, 1979)

STATEHOOD ACT

Federal title to land may be lost by erosion, and land which has become submerged under water is no longer subject to disposition under the Alaska Native Allotment Act. The fact that an Alaska Native may have used, occupied, and filed an application for such land when it was dry does not prevent the loss of Federal title to that land by erosion. Neither the Alaska Statehood Act nor the Submerged Lands Act prevents the passage of title to such land to the State.

Frank Rulland, 41 IBLA 207 (June 27, 1979) 86 I.D. 342

ALASKA--Continued

STATEHOOD ACT--Continued

Withdrawal of land in 1940, inclusion of the land in a grazing lease under authority of the Alaska Grazing Act of Mar. 4, 1927, revocation of the withdrawal in 1961, and selection of the land by the State of Alaska under authority of the Statehood Act in 1963 effectively kept the land closed to the initiation of rights under the Native Allotment Act at all times during the period from 1940 to the revocation of the Allotment Act on Dec. 18, 1971, by sec. 18 of the Alaska Native Claims Settlement Act.

Norman Opheim, Billy Boskofsky, Jr. (As Heir of Nicholas Boskofsky), 41 IBLA 338 (July 11, 1979)

TIDELANDS

Federal title to land may be lost by erosion, and land which has become submerged under water is no longer subject to disposition under the Alaska Native Allotment Act. The fact that an Alaska Native may have used, occupied, and filed an application for such land when it was dry does not prevent the loss of Federal title to that land by erosion. Neither the Alaska Statehood Act nor the Submerged Lands Act prevents the passage of title to such land to the State.

Frank Rulland, 41 IBLA 207 (June 27, 1979) 86 I.D. 342

TOWNSITES

Where there are conflicting applications for a lot in a Native townsite and the evidence as to who has the better claim is vague and inconclusive, the townsite trustee should submit the matter for a hearing before an administrative law judge. 43 CFR 2565.4(b).

James T. Friedman, 39 IBLA 229 (Feb. 12, 1979)

Rights may be established by occupancy of a trade and manufacturing site on vacant, unappropriated public domain in Alaska and filing of a notice of location thereof, despite a prior survey pursuant to a petition for survey of townsite lands, when the notice of location and occupancy of the claim for trade and manufacturing precedes settlement and occupancy under the townsite laws.

Carl A. Line, 40 IBLA 63 (Mar. 16, 1979)

Alaska Natives who occupied lots in a Native townsite on date of approval of final subdivisional townsite survey, prior to Oct. 21, 1976, are entitled to receive deeds thereto from the townsite trustee.

Leona R. Strang (Supp.), 43 IBLA 156 (Sept. 28, 1979)

TRADE AND MANUFACTURING SITES

An entryman may not take advantage of sec. 7 of the Act of Mar. 3, 1891, entitling an entryman to a patent after 2 years from date of issuance of a receiver's receipt when there is no pending contest or protest against the validity of the entry, where he has not shown that preconditions of the Act have been met, i.e., making the final payments required.

In a contest proceeding the Government has the burden of establishing a prima facie case of noncompliance with the requirements for trade and manufacturing, and

ALASKA--Continued

TRADE AND MANUFACTURING SITES--Continued

headquarters sites. The burden then shifts to the applicant to show by a preponderance of the evidence that he has used, occupied, and improved the sites for trade, manufacture, or other productive industry.

A claimant of a trade and manufacturing site must show that at the time of filing his application to purchase he was engaged in trade, manufacture, or other productive industry in connection with the sites. While it is not necessary for the claimant to show that all functions of the business were carried on at the site, he must show a bona fide commercial enterprise from which he reasonably hoped to derive a profit; mere preparation for a prospective business is not sufficient under the regulations. A claimant for a headquarters site must also be engaged in such a business or be an employee of such a business.

United States v. Jack Zemmy Boyd, Jr., 39 IBLA 321 (Feb. 27, 1979)

Rights may be established by occupancy of a trade and manufacturing site on vacant, unappropriated public domain in Alaska and filing of a notice of location thereof, despite a prior survey pursuant to a petition for survey of townsite lands, when the notice of location and occupancy of the claim for trade and manufacturing precedes settlement and occupancy under the townsite laws.

Carl A. Line, 40 IBLA 63 (Mar. 16, 1979)

Where a trade and manufacturing site is located on land that is withdrawn from appropriation prior to its occupancy and use, an application to purchase is properly denied despite the fact that applicant entered the land as a special use permittee.

Mardelle M. Smith, Sherman C. Smith, 42 IBLA 136 (Aug. 16, 1979)

Any right which may be gained under a notice of location for a trade and manufacturing site or a homesite, as required by the Act of Apr. 29, 1950, 43 U.S.C. § 687a-1 (1976), is personal to the party filing the notice.

A trade and manufacturing site notice of location not supported by actnal settlement and occupancy authorized by 43 U.S.C. § 687a (1976) does not change the status of the public lands.

James Sims, 42 IBLA 231 (Aug. 22, 1979)

ALASKA NATIVE CLAIMS SETTLEMENT ACT (Dec. 18, 1971, 85 Stat. 688)

GENERALLY

The Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976), repealed the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970), with the exception of applications pending on Dec. 18, 1971. A State Office decision rejecting a Native allotment application for an additional parcel of land filed pursuant to the Act of May 17, 1906, after Dec. 18, 1971, will be affirmed. Equitable adjudication, which requires substantial compliance with the law, will not be invoked where there is no evidence that such an application was timely filed with BIA.

Nora L. Sanford, 43 IBLA 74 (Sept. 19, 1979)

ALASKA NATIVE CLAIMS SETTLEMENT ACT (Dec. 18, 1971, 85 Stat. 688)--Continued

ABORIGINAL CLAIMS

The Alaska Native Claims Settlement Act extinguished aboriginal occupancy claims of Alaska Natives; such claims cannot serve as a bar to a State selection, nor preclude the State from challenging Native allotment applications conflicting with its selection.

Under the "functional" standard to determine administrative standing set forth in Koniag, Inc. v. Andrus, 580 F.2d 601 (D.C. Cir. 1978), cert. denied, 99 S. Ct. 733 (1979), the State of Alaska has standing to challenge Native allotment applications conflicting with its selection applications even if the land is within a Native village selection area under the Alaska Native Claims Settlement Act. The State has standing under Departmental regulations to initiate private contests against such conflicting Native allotment applications.

State of Alaska et al., 41 IBLA 315 (July 11, 1979)
86 I.D. 361

ADMINISTRATIVE PROCEDURE

Generally

Absent reasons justifying continuance of the appeal, an appeal will be dismissed when the appellant and all parties of record before the Board stipulate to a dismissal of the appeal.

Appeal of State of Alaska, Dept. of Transportation and Public Facilities, 3 ANCAB 124 (Jan. 5, 1979)

Absent reasons justifying continuance of the appeal, an appeal will be dismissed when the appellant before the Board withdraws the appeal.

Appeal of Kenneth Arndt, 3 ANCAB 127 (Jan. 15, 1979)

Appeal of Al L. Weathers, 3 ANCAB 165 (Feb. 22, 1979)

Appeal of Savoonga Native Corp. and Gambell Native Corp., 3 ANCAB 190 (Apr. 6, 1979)

ANCAB is bound by statements of Secretarial policy contained in Secretarial Orders published in the Federal Register.

Appeal of State of Alaska, 3 ANCAB 129 (Jan. 19, 1979)
86 I.D. 45

Absent reasons justifying continuance of the appeal, an appeal will be dismissed when the appellant before the Board files a voluntary dismissal.

Appeal of Kenai Peninsula Borough, 3 ANCAB 258 (May 18, 1979)

This Board does not have jurisdiction to adjudicate the Secretary's authority to withdraw lands for possible selection by a Native corporation pursuant to § 14(h)(8) of ANCSA.

Appeal of the State of Alaska, 3 ANCAB 285 (June 11, 1979)

ALASKA NATIVE CLAIMS SETTLEMENT ACT (Dec. 18, 1971, 85 Stat. 688)--Continued

ADMINISTRATIVE PROCEDURE--Continued

Generally--Continued

Absent reasons justifying continuance of the appeal, an appeal will be dismissed when the parties stipulate to a dismissal of the appeal.

Appeal of State of Alaska, Department of Transportation, 3 ANCAB 291 (June 29, 1979)

Appeal of the State of Alaska, 3 ANCAB 294 (July 10, 1979)

The Board is bound by Secretarial policy and interpretation of law expressed in a Solicitor's Opinion in which the Secretary of the Interior concurred.

Regulations in 43 CFR 2650.5-1(b) deal explicitly with chargeability of acreage and implicitly with land title, establishing two categories of submerged lands not required to be selected and charged: those underlying navigable waters, and those underlying nonnavigable waters of one-half section or more.

Under regulations in 43 CFR 2650.5-1(b), Federal ownership of submerged lands does not require all such lands to be charged against a Native corporation's acreage entitlement.

The Secretary, and this Board, are bound by duly promulgated regulations of the Department.

As between a published regulation applicable to chargeability of submerged land and an unpublished Departmental decision paper applicable to the same issue, the Board is bound to follow the regulation. Therefore, regardless of whether the United States retains ownership of the bed of the Colville River, the Bureau of Land Management must, pursuant to 43 CFR 2650.5-1(b), determine whether the river is navigable and, if it is found navigable, must exclude the riverbed from the acreage to be charged against Kuugpik's entitlement.

Appeal of State of Alaska, 3 ANCAB 297 (July 31, 1979)
86 I.D. 381

Interim Conveyance

The granting of a right-of-way under FLPMA and the superseded Acts of Feb. 15, 1901, and Mar. 4, 1911, is within the Secretary's discretion and neither the filing of the application nor the existence of improvements earns appellant a right to the right-of-way. No rights vest in the applicant until the grant is approved by the Secretary. An application for a right-of-way is properly rejected where the land is in an interim conveyance to a Native Corporation.

"Public Lands." Land within an interim conveyance to a Native Corporation is no longer "public land" under the Federal Land Policy and Management Act nor subject to Bureau of Land Management jurisdiction to issue rights-of-way under that Act.

New England Fish Co., 42 IBLA 200 (Aug. 22, 1979)

ALASKA NATIVE CLAIMS SETTLEMENT ACT (Dec. 18, 1971, 85 Stat. 688)--Continued

ALASKA NATIVE CLAIMS APPEAL BOARD

Administrative Procedure

Interim Conveyance

A special use permit shall be terminated upon issuance of a decision of interim conveyance to a Native corporation when the permit contains language to the effect that should the permit fall within the boundaries of a present or future Native claims selection area, such permit will be terminated.

Appeal of Yak-Tat Kwaan, Inc., 3 ANCAB 182 (Mar. 20, 1979)

Interim conveyance and patent are documents of equal significance in the granting of title under ANCSA, and when interim conveyance has been issued, the Secretary and this Board lose jurisdiction over those interests in land which has been conveyed.

Appeal of James W. Lee, 3 ANCAB 334 (Aug. 31, 1979)

Appeals

Generally

ANCAB is bound by statements of Secretarial policy contained in Secretarial Orders published in the Federal Register.

A timely appealed Bureau of Land Management decision does not constitute a final Departmental decision as that term is used in sentence 5, sec. 2 of S.O. 3029.

Appeal of State of Alaska, 3 ANCAB 129 (Jan. 19, 1979) 86 I.D. 45

The Board is bound by Secretarial policy and interpretation of law expressed in a Solicitor's Opinion in which the Secretary of the Interior concurred.

The Secretary, and this Board, are bound by duly promulgated regulations of the Department.

As between a published regulation applicable to chargeability of submerged land and an unpublished Departmental decision paper applicable to the same issue, the Board is bound to follow the regulation. Therefore, regardless of whether the United States retains ownership of the bed of the Colville River, the Bureau of Land Management must, pursuant to 43 CFR 2650.5-1(b), determine whether the river is navigable and, if it is found navigable, must exclude the riverbed from the acreage to be charged against Kuugpik's entitlement.

Appeal of State of Alaska, 3 ANCAB 297 (July 31, 1979) 86 I.D. 381

Until a village corporation makes its determination of an appellant's rights claimed under § 14(c) of ANCSA (85 Stat. 688, 703, 43 U.S.C. §§ 1601, 1613(c) (Supp. I 1977)), there is no way to determine if a dispute exists between a person claiming under § 14(c) and the village corporation.

There is no administrative appeal process available to claimants under § 14(c) of ANCSA, and such claims must be brought in a judicial forum.

Appeal of James W. Lee, 3 ANCAB 334 (Aug. 31, 1979)

ALASKA NATIVE CLAIMS SETTLEMENT ACT (Dec. 18, 1971, 85 Stat. 688)--Continued

ALASKA NATIVE CLAIMS APPEAL BOARD--Continued

Appeals--Continued

Jurisdiction

After expiration of the period in which a decision finding a village eligible may be appealed, and the village has been certified as eligible for benefits under § 11 of ANCSA, the Board has no jurisdiction over an appeal challenging the eligibility of the village and will dismiss such an appeal.

Appeal of Irving C. Wedmore, 3 ANCAB 252 (May 16, 1979)

The effect of the issuance of a patent to public lands by the United States, even if issued by mistake or inadvertence, is to transfer the legal title from the United States and to end all authority and jurisdiction of the Department of the Interior over the lands conveyed. The proper forum to further adjudicate the status of such an interest is in a judicial proceeding and the Board lacks jurisdiction to decide the issue.

Appeal of Alaska Railroad, 3 ANCAB 273 (June 7, 1979) 86 I.D. 397

Appeal of Alaska Railroad, 3 ANCAB 280 (June 8, 1979)

An appeal based on interests created by § 14(c) of ANCSA, filed prior to issuance of interim conveyance to the appropriate village corporation, is premature, and the Board lacks jurisdiction to hear such an appeal.

Appeal of James W. Lee, 3 ANCAB 334 (Aug. 31, 1979)

The effect of the issuance of a patent by the United States, even if issued by mistake or inadvertence, is to transfer the legal title from the United States and to end all authority and jurisdiction of the Department of the Interior over the lands conveyed. The proper forum to further adjudicate the status of an alleged interest in the conveyed lands in someone other than the patentee is in a judicial proceeding, and the Board lacks jurisdiction to decide an appeal based on a claim to patented lands.

Appeal of the Alaska Railroad, 3 ANCAB 346 (Aug. 31, 1979)

The effect of the issuance of a patent to public lands by the United States, even if issued by mistake or inadvertence, is to transfer the legal title from the United States and to end all authority and jurisdiction of the Department of the Interior over the lands conveyed. The proper forum to further adjudicate the status of such an interest is in a judicial proceeding and the Board lacks jurisdiction to decide the issue.

Sec. 316 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 2770, 43 U.S.C. §§ 1701-1782 at 1746 (1976), was not intended to alter the long-established rule regarding the Department of the Interior's loss of jurisdiction to adjudicate interests in land following the issuance of patent for that land.

Appeal of the Alaska Railroad (On Reconsideration), 3 ANCAB 351 (Sept. 18, 1979) 86 I.D. 452

Appeal of Alaska Railroad (On Reconsideration), 3 ANCAB 377 (Sept. 21, 1979)

ALASKA NATIVE CLAIMS SETTLEMENT ACT (Dec. 18, 1971, 85 Stat. 688)--Continued

ALASKA NATIVE CLAIMS APPEAL BOARD--Continued

Appeals--Continued

Jurisdiction--Continued

The effect of the issuance of a patent or interim conveyance by the United States, even if issued by mistake or inadvertence, is to transfer the legal title from the United States and to end all authority and jurisdiction of the Department of the Interior over the lands conveyed. The proper forum to further adjudicate the status of an alleged interest in the conveyed lands is in a judicial proceeding, and the Board lacks jurisdiction to decide an appeal based on a claim to conveyed lands.

Appeal of the Alaska Railroad, 3 ANCAB 365 (Sept. 19, 1979)

Appeal of the Alaska Railroad, 3 ANCAB 371 (Sept. 19, 1979)

Reconsideration

Where a person received no notice of a decision affecting his open-to-entry lease, and where the Secretary has reconsidered and reversed the Board's ruling on valid existing rights in an appeal from that decision, the Board considers these circumstances extraordinary within the meaning of 43 CFR 4.21(c) and will reconsider its ruling.

Appeal of Raymond E. Miller, 3 ANCAB 238 (May 14, 1979)
86 I.D. 285

Standing

Where the State of Alaska has not selected lands within the lands in dispute in an appeal, the State cannot be found to claim a property interest in such lands, within the meaning of standing regulations in 43 CFR 4.902, by reason of a prior selection.

The test of standing to appeal under 43 CFR 4.902 is not whether a person is an "aggrieved party," but whether a person "claims a property interest in land affected by a determination from which an appeal to ANCAB is allowed."

While a "property interest" sufficient to confer standing under 43 CFR 4.902 need not be a vested interest, it may not be completely speculative.

Where the State's "interest" in a particular tract of land is based only on the possibility of a decision, at some future time, to select such land in preference to other land under the Statehood Act, the State's "interest" is too speculative to constitute a "property interest" under 43 CFR 4.902.

Appeal of State of Alaska, 3 ANCAB 196 (Apr. 11, 1979)
86 I.D. 225

Summary Dismissal

Absent reasons justifying continuance of the appeal, an appeal will be dismissed when the appellant and all parties of record before the Board stipulate to a dismissal of the appeal.

Appeal of State of Alaska, Dept. of Transportation and Public Facilities, 3 ANCAB 124 (Jan. 5, 1979)

ALASKA NATIVE CLAIMS SETTLEMENT ACT (Dec. 18, 1971, 85 Stat. 688)--Continued

ALASKA NATIVE CLAIMS APPEAL BOARD--Continued

Appeals--Continued

Summary Dismissal--Continued

Absent reasons justifying continuance of the appeal, an appeal will be dismissed when the appellant before the Board withdraws the appeal.

Appeal of Kenneth Arndt, 3 ANCAB 127 (Jan. 15, 1979)

Appeal of Al L. Weathers, 3 ANCAB 165 (Feb. 22, 1979)

Appeal of Savoonga Native Corp. and Gambell Native Corp., 3 ANCAB 190 (Apr. 6, 1979)

An issue in an appeal will be dismissed for lack of diligent prosecution when a party fails to respond to an Order of this Board requiring a showing of cause why an issue should not be dismissed.

Appeal of State of Alaska, 3 ANCAB 129 (Jan. 19, 1979)
86 I.D. 45

Absent reasons justifying continuance of the appeal, an appeal will be dismissed when the appellant before the Board files a voluntary dismissal.

Appeal of Kenai Peninsula Borough, 3 ANCAB 258 (May 18, 1979)

Appeal of Pacific Pearl Seafoods, 3 ANCAB 383 (Sept. 25, 1979)

This Board does not have jurisdiction to adjudicate the Secretary's authority to withdraw lands for possible selection by a Native corporation pursuant to § 14(h)(8) of ANCSA.

Appeal of the State of Alaska, 3 ANCAB 285 (June 11, 1979)

Absent reasons justifying continuance of the appeal, an appeal will be dismissed when the parties stipulate to a dismissal of the appeal.

Appeal of State of Alaska, Department of Transportation, 3 ANCAB 291 (June 29, 1979)

Appeal of the State of Alaska, 3 ANCAB 294 (July 10, 1979)

An appeal will be summarily dismissed when in response to a motion to show cause, the appellant states in writing it has no objections to the dismissal.

Appeal of Lone Star Industries, Inc., 3 ANCAB 321 (Aug. 17, 1979)

Dismissal

Generally

When a special use permit states that it expires on a specified date, the Board is bound by that language and will dismiss the permit holder from the appeal on the grounds that the permit holder no longer has a property

ALASKA NATIVE CLAIMS SETTLEMENT ACT (Dec. 18, 1971, 85 Stat. 688)--Continued

ALASKA NATIVE CLAIMS APPEAL BOARD--Continued

Dismissal--Continued

Generally--Continued

interest affected after the expiration date of the permit.

When a person is made a necessary party to an appeal by the Board, is served with the Board's Order naming him as a necessary party, and subsequently neither files an appearance nor files an answer or reply within the time allotted by the Board, such person will be dismissed as a party to this appeal.

Appeal of Yak-Tat Kwaan, Inc., 3 ANCAB 182 (Mar. 20, 1979)

CONVEYANCES

Generally

Valid existing rights held by third parties that lead to acquisition of title, must be identified in the conveyancing document and the land covered thereby excluded from the conveyance to the selecting Native corporation.

Appeal of Raymond A. Kreig, 3 ANCAB 168 (Mar. 9, 1979) 86 I.D. 189

"Public Lands." Land within an interim conveyance to a Native Corporation is no longer "public land" under the Federal Land Policy and Management Act nor subject to Bureau of Land Management jurisdiction to issue rights-of-way under that Act.

New England Fish Co., 42 IBLA 200 (Aug. 22, 1979)

Reconveyances

Until a village corporation makes its determination of an appellant's rights claimed under § 14(c) of ANCSA (85 Stat. 688, 703, 43 U.S.C. §§ 1601, 1613(c) (Supp. I 1977)), there is no way to determine if a dispute exists between a person claiming under § 14(c) and the village corporation.

An appeal based on interests created by § 14(c) of ANCSA, filed prior to issuance of interim conveyance to the appropriate village corporation, is premature, and the Board lacks jurisdiction to hear such an appeal.

Interim conveyance and patent are documents of equal significance in the granting of title under ANCSA, and when interim conveyance has been issued, the Secretary and this Board lose jurisdiction over those interests in land which has been conveyed.

There is no administrative appeal process available to claimants under § 14(c) of ANCSA, and such claims must be brought in a judicial forum.

A reservation in a decision to convey, stating that conveyance to the village corporation is subject to the requirements of § 14(c) of ANCSA, protects rights in use and occupancy of the land, if any, claimed by the appellant under § 14(c), until the village corporation makes a determination as to the appellant's rights under § 14(c).

Appeal of James W. Lee, 3 ANCAB 334 (Aug. 31, 1979)

ALASKA NATIVE CLAIMS SETTLEMENT ACT (Dec. 18, 1971, 85 Stat. 688)--Continued

DEFINITIONS

Public Lands

Lands withdrawn pursuant to ANCSA are held for the benefit of Indians, Aleuts, and Eskimos, and thus are not "public lands" within the scope of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701-1782 (1976). 43 U.S.C. § 1702(e) (1976).

Appeal of Alaska Railroad, 3 ANCAB 273 (June 7, 1979) 86 I.D. 397

On reconsideration, the Board vacates its prior holdings that lands withdrawn under the Alaska Native Claims Settlement Act, 85 Stat. 688, as amended, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977), are lands held for the benefit of Indians, Aleuts and Eskimos and thus are not "public lands" within the scope of FLPMA, supra, and that FLPMA does not apply to such lands.

Appeal of the Alaska Railroad (On Reconsideration), 3 ANCAB 351 (Sept. 18, 1979) 86 I.D. 452

DISENROLLMENT

Computation of Time for Filing and Service

Except as otherwise provided by law, in computing any period of time prescribed for filing and serving a document, the day upon which the decision or document to be appealed from or answered was served or the day of any other event after which the designated period of time begins to run is not to be included, unless it is a Saturday, Sunday, Federal legal holiday, or other nonbusiness day, in which event the period runs until the end of the next day which is not a Saturday, Sunday, Federal legal holiday, or other nonbusiness day.

Henry Sam Littlefield, Jr., 7 IBIA 128 (Mar. 30, 1979) 86 I.D. 217

ENROLLMENT

Metlakatla Natives

No person enrolled in the Metlakatla Indian Community of the Annette Islands Reserve as of Apr. 1, 1970, shall be eligible for enrollment under the Act.

Henry Sam Littlefield, Jr., 7 IBIA 128 (Mar. 30, 1979) 86 I.D. 217

The appearance of one's name on the Metlakatla Indian community rolls of the Annette Islands Reserve in 1976 in itself is not conclusive of membership status. However, that fact considered in conjunction with other evidence indicating active involvement and contact with the community over the years including the year 1970 does not constitute continuous absence from the community.

Absent active involvement and contact and continuous absence of 2 years prior to Apr. 1, 1970, by a minor born outside the Metlakatla community and having never resided therein constitutes forfeiture of membership in the community, derived solely through a parent member of that community.

Alaska Native Disenrollment Appeals of: James Edward Scott, Sr., and Robert Charles Scott, 7 IBIA 157 (June 21, 1979) 86 I.D. 333

ALASKA NATIVE CLAIMS SETTLEMENT ACT (Dec. 18, 1971, 85 Stat. 688)--Continued

LAND SELECTIONS

State Interests

Generally

Inasmuch as the disputed gravel free nse permits were transferred from one State agency, the Division of Lands, to another State agency, the Department of Highways, they do not constitute third-party interests protected as valid existing rights under § 14(g) of ANCSA.

Appeal of Choggiung, Ltd., 3 ANCAB 325 (Aug. 17, 1979) 86 I.D. 392

Third-Party Interests

Inasmuch as the disputed gravel free use permits were transferred from one State agency, the Division of Lands, to another State agency, the Department of Highways, they do not constitute third-party interests protected as valid existing rights under § 14(g) of ANCSA.

Appeal of Choggiung, Ltd., 3 ANCAB 325 (Aug. 17, 1979) 86 I.D. 392

Valid Existing Rights

Pursuant to the policy of the Department of the Interior as set forth in Secretarial Order 3029 (43 FR 55287 (1978)), open-to-entry leases issued prior to the passage of ANCSA must be excluded from lands conveyed to village corporations pursuant to the Alaska Native Claims Settlement Act of Dec. 18, 1971, 85 Stat. 688; 43 U.S.C. §§ 1601-1611 (Supp. V, 1975).

Appeal of Richard R. Robinson, 3 ANCAB 140 (Jan. 31, 1979) 86 I.D. 55

Appeal of James E. Bedell, 3 ANCAB 153 (Jan. 31, 1979) 86 I.D. 60

Preference rights to purchase set forth in Public Land Order No. 1613, Apr. 7, 1958, that were outstanding as of the date of the passage of ANCSA, are valid existing rights protected by ANCSA.

Valid existing rights held by third parties that lead to acquisition of title, must be identified in the conveyancing document and the land covered thereby excluded from the conveyance to the selecting Native corporation.

Appeal of Raymond A. Kreig, 3 ANCAB 168 (Mar. 9, 1979) 86 I.D. 189

"Valid existing rights" protected by § 14(g) of ANCSA include both interests of a temporary or limited natnre and interests leading to the acquisition of title, when such interests were created prior to ANCSA and are being perfected or maintained pursuant to State or Federal law.

Application by the State of Alaska for lands under the Federal Airport Act, and compliance with such law leading to the acquisition of title prior to ANCSA, is sufficient to create a valid existing right in the State of Alaska protected by § 14(g) of ANCSA.

Pursuant to regulations in 43 CFR 2650.3-1(a), interests protected pursuant to ANCSA which lead to fee

ALASKA NATIVE CLAIMS SETTLEMENT ACT (Dec. 18, 1971, 85 Stat. 688)--Continued

LAND SELECTIONS--Continued

Valid Existing Rights--Continued

title in the State are to be excluded from conveyance to a Native corporation.

Appeal of Tanacross, Inc., 3 ANCAB 219 (Apr. 23, 1979) 86 I.D. 257

An open-to-entry lease issued nnder A.S. 38.05.077, inclnding any associated right to purchase the leased land granted by State statute, is protected as a valid existing right under ANCSA, and the leasehold must be excluded from any conveyance to a Native corporation under ANCSA.

Appeal of Raymond E. Miller, 3 ANCAB 238 (May 14, 1979) 86 I.D. 285

"Valid existing rights" protected by § 14(g) of ANCSA inclnde interests of a temporary or limited nature when such interests were created prior to ANCSA and are being maintained pursuant to State or Federal law.

The leases in issue are sufficient to create valid existing rights in the appellants (to the extent of their terms) which are protected by § 14(g) of ANCSA. The affected lands must therefore be conveyed "subject thereto."

Though creating interests in the appellants which are protected by § 14(g) of ANCSA, Alaska Stat. § 38.05.102, as applied to the leases in issue, does not create a valid existing right leading to the acquisition of title which would require the subject lands to be excluded from the Native conveyance as required by Order No. 3029 (43 FR 55287) in its treatment of open-to-entry leases.

Appeal of Reed E. Oswalt et al., 3 ANCAB 261 (May 24, 1979)

Inasmuch as the disputed gravel free use permits were transferred from one State agency, the Division of Lands, to another State agency, the Department of Highways, they do not constitute third-party interests protected as valid existing rights under § 14(g) of ANCSA.

Appeal of Choggiung, Ltd., 3 ANCAB 325 (Aug. 17, 1979) 86 I.D. 392

Withdrawals

Lands withdrawn pursuant to ANCSA are not snbject to § 316 of FLPMA, 43 U.S.C. § 1746 (1976).

Appeal of Alaska Railroad, 3 ANCAB 273 (June 7, 1979) 86 I.D. 397

On reconsideration, the Board vacates its prior holdings that lands withdrawn under the Alaska Native Claims Settlement Act, 85 Stat. 688, as amended, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977), are lands held for the benefit of Indians, Aleuts and Eskimos and thus are not "public lands" within the scope of FLPMA, supra, and that FLPMA does not apply to such lands.

Appeal of the Alaska Railroad (On Reconsideration), 3 ANCAB 351 (Sept. 18, 1979) 86 I.D. 452

ALASKA NATIVE CLAIMS SETTLEMENT ACT (Dec. 18, 1971, 85 Stat. 688)--Continued

RENUNCIATION OF ENROLLMENT IN METLAKATLA INDIAN COMMUNITY

The right of renunciation or expatriation is the natural and inherent right of the individual.

Any member of any Indian tribe is at full liberty to terminate his tribal relationship whenever he so chooses, although it has been said that such termination will not be inferred "from light and trifling circumstances."

Henry Sam Littlefield, Jr., 7 IBIA 128 (Mar. 30, 1979) 86 I.D. 217

VILLAGE ELIGIBILITY

Generally

After expiration of the period in which a decision finding a village eligible may be appealed, and the village has been certified as eligible for benefits under § 11 of ANCSA, the Board has no jurisdiction over an appeal challenging the eligibility of the village and will dismiss such an appeal.

Appeal of Irving C. Wedmore, 3 ANCAB 252 (May 16, 1979)

APPEALS

A final Departmental appellate decision construing a regulation will be given immediate effect, and will not be applied with prospective effect only, unless the decision alters materially the interpretation given the regulation by earlier Departmental decisions or official published opinions, and unless the equitable benefit of the decision is not outweighed by ill effects of allowing a benefit in derogation of the regulation.

Gertrude H. D'Amico, 39 IBLA 68 (Jan. 17, 1979)

A mining claim contestee's allegation that BLM wrongly held a mining claim null and void ab initio will not be entertained where the contention is raised long after the time for appealing the decision has passed.

United States v. Jerry Prock et al., 39 IBLA 148 (Jan. 29, 1979)

A party adversely affected by a final order or decision of an officer of the Conservation Division of the Geological Survey has a right to appeal to the Director, Geological Survey, unless the decision was approved by the Secretary or Director prior to promulgation.

A party adversely affected by a final decision of the Director, Geological Survey, had a right of appeal to the Board of Land Appeals in the Office of Hearings and Appeals, Office of the Secretary.

Phoenix Resources Co., 39 IBLA 153 (Jan. 29, 1979)

Where Bureau of Land Management terminates a sodium lease because lessee failed to submit justification for holding a lease in excess of the acreage limitation, the decision will be set aside upon submission or explanation of failure to provide written information, and the case will be remanded for the State Office to determine whether the information submitted on appeal justifies continued lease tenure.

Olin Corp., 39 IBLA 161 (Jan. 29, 1979)

APPEALS--Continued

Where the Secretary has declined to exercise his jurisdiction, a decision rendered by this Board is final for the Department. Hence, statements by BLM and arguments of the Solicitor, while valuable to the Board, are not binding upon the Board.

H. R. Delasco, Inc., et al., 39 IBLA 194 (Feb. 2, 1979)

A notice of appeal must be filed within 30 days after appellant is served with the decision from which he is appealing. When a party does not appeal, the doctrine of administrative finality, the administrative equivalent of res judicata, generally bars consideration of the same issue in a later appeal.

Ralph and Ruth Dickinson, 39 IBLA 258 (Feb. 15, 1979)

When a State Office rejects the offer of a first-drawn applicant in a drawing under the simultaneous oil and gas leasing program, an appeal by the applicant raises the issue of his qualifications to hold the lease. The qualifications of the second-drawn applicant are irrelevant until such time as the offer of the first-drawn applicant is rejected and all his avenues of appeal are exhausted. However, it is not improper for BLM to name the second-drawn applicant as an adverse party in a decision rejecting the first-drawn applicant.

Thomas R. Flickinger, William S. Flickinger, et al., 40 IBLA 53 (Mar. 16, 1979)

The applicable regulation, 43 CFR 4.414 (1977), allows the Board some discretion in deciding whether to disregard the answer of an appellee who fails to file an answer within 30 days after service on him of the notice of appeal or statement of reasons and whose delay in filing is not waived under the provisions of 43 CFR 4.401(a) (1977).

California Portland Cement Co., Rosebud Coal Sales Co., 40 IBLA 339 (May 10, 1979)

A statement of reasons in support of an appeal which does not point out affirmatively in what respect the decision appealed from is in error does not meet the requirements of the Department's rules of practice and may be dismissed.

Duncan Miller, 41 IBLA 129 (June 13, 1979)

Where the holder of an oil and gas lease on the Outer Continental Shelf has filed a suit in a Federal district court to recover certain royalties paid under his lease, the Board of Land Appeals will affirm a decision of the Director, Geological Survey, holding in abeyance the lessee's request for a refund while the suit is pending.

Tenneco Oil Co., 41 IBLA 195 (June 22, 1979)

The right of appeal to the Board is limited to parties to a case adversely affected by a decision of BLM. A person protesting a timber sale does not become a party to a case until such time as BLM has issued a final decision adverse to his or her interests. The case is ordinarily ripe for appeal only when an adverse decision is made on the protest.

Elaine Mikels et al., 41 IBLA 305 (July 3, 1979)

APPEALS--Continued

Where there is a conflict between an application by the State of Alaska to select land under the Statehood Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to BLM that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may not appeal from the "Notice," which is interlocutory, but it may initiate private contest proceedings tc prove lack of qualification on the part of the Native, or it may appeal the subsequent decision of BLM to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient it will order the institution of Government contest proceedings, but if it finds the allotment applicatcn acceptable, it will order the patent issued, if all else be regular.

State of Alaska, 41 IBLA 309 (July 5, 1979)

A decision by the Bureau of Land Management canceling fee simple patents issued to Indians and simultaneously issuing new Indian trust patents is not subject to review by the Board of Land Appeals, which has no jurisdiction in the matter, where the decision was made at the direction of the Assistant Secretary for Indian Affairs.

Blue Star, Inc., Atomic Western, Inc., Fremont Energy Corp., Ivor Adair, 41 IBLA 333 (July 11, 1979)

Where BLM fails to show that there was service of a decision rejecting an Alaska Native allotment and the applicant learns of his rejection 4-1/2 years after rejection, the applicant may file a timely appeal within 30 days of notice of the decision.

Mailing to the Bureau of Indian Affairs a carbon copy of a decision rejecting an application for an Alaska Native allotment is not service upon the applicant so as to comply with 43 CFR 4.401.

Gust J. Reft, Sr., 42 IBLA 86 (Aug. 13, 1979)

Where there is a conflict between an application by the State of Alaska to select land under the Statehood Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to BLM that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may not appeal from an interlocutory decision which authorizes the State to initiate private contest proceedings to prove lack of qualification on the part of the Native. Rather, it may initiate the private contest within the time period prescribed, or it may appeal the decision of BLM, after it becomes final, to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient it will order the institution of Government contest proceedings, but if it finds the allotment application acceptable, it will order the patent issued, if all else be regular.

Where it appears that a party did not realize that an election of remedies was mandated by Departmental procedures, a decision requiring the initiation of a private contest will be set aside, and the party will be permitted a period of time in which to initiate a private contest, or alternatively, waive such private contest and pursue a direct appeal on the question of whether a Government contest should issue.

State of Alaska et al., 42 IBLA 94 (Aug. 16, 1979)

APPEALS--Continued

Where, on appeal, a mining claimant alleges that he timely mailed the affidavits of assessment work to the proper BLM office but there is no evidence to indicate they were ever received, the claimant must bear the conseguences of the loss and his inability to prove his allegation that they may have been received by the Bureau and subseguently lost.

Amanda Mining & Manufacturing Ass'n, 42 IBIA 144 (Aug. 16, 1979)

Roger Kuhn, 43 IBLA 182 (Sept. 28, 1979)

Allegations on appeal will not be afforded favorable consideration where they are not stated with some particularity and supported by evidence.

New England Fish Co., 42 IBLA 200 (Aug. 22, 1979)

Where there is a conflict between an application by the State of Alaska to select land under the Alaska Mental Health Enabling Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to the Bureau of Land Management that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may initiate private contest proceedings to prove lack of qualification on the part of the Native, or it may appeal the determinatcn to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient, it will order the institution of Government contest proceedings. If, however, the Board affirms the finding that the requirements of patent have been met, the State will have no further administrative recourse. Where the State had not, prior to its appeal, been afforded notice of the election, it should be afforded an opportunity to make such election.

State of Alaska v. Mattie B. Bartos, 42 IBLA 269 (Aug. 27, 1979)

State of Alaska v. Daniel Johnson, 42 IBLA 370 (Sept. 11, 1979) 86 I.D. 441

Failure to obtain counsel at a hearing into the validity of a mining claim will afford the mining claimant no greater rights on appeal than if he had obtained counsel.

United States v. Howard D. Long, Dolores M. Killion, 43 IBLA 150 (Sept. 28, 1979)

Where an appellant admits in correspondence with the Department that the decision of the Bureau of Land Management State Office holding his mining claim invalid is correct, the appeal may be dismissed.

Ernest F. Hiniker, 43 IBLA 153 (Sept. 28, 1979)

APPLICATIONS AND ENTRIES

GENERALLY

Where the Secretary by appropriate notice in the Federal Register has classified certain lands for multiple use management and such lands are segregated from desert land entry, and the classification has not

APPLICATIONS AND ENTRIES--Continued

GENERALLY--Continued

been terminated by either a reclassification or publication in Federal Register of termination of classification, BLM properly denied petition-application for desert land entry.

Paul M. Jenkins, 39 IBLA 141 (Jan. 29, 1979)

Melvin V. Frandsen, Mary C. Frandsen, 43 IBLA 130 (Sept. 26, 1979)

An entryman may not take advantage of sec. 7 of the Act of Mar. 3, 1891, entitling an entryman to a patent after 2 years from date of issuance of a receiver's receipt when there is no pending contest or protest against the validity of the entry, where he has not shown that preconditions of the Act have been met, i.e., making the final payments required.

United States v. Jack Zemmy Boyd, Jr., 39 IBLA 321 (Feb. 27, 1979)

Rights may be established by occupancy of a trade and manufacturing site on vacant, unappropriated public domain in Alaska and filing of a notice of location thereof, despite a prior survey pursuant to a petition for survey of townsite lands, when the notice of location and occupancy of the claim for trade and manufacturing precedes settlement and occupancy under the townsite laws.

Carl A. Line, 40 IBLA 63 (Mar. 16, 1979)

When an applicant for a noncompetitive oil and gas lease is requested to provide additional information for the adjudication of his drawing entry card offer, the offer is properly rejected where the evidence provided is illegible, and applicant was notified of the illegibility but responded by sending more illegible evidence.

Richard P. Lewis, 40 IBLA 100 (Mar. 27, 1979)

Where an application for a special use permit is not filed until more than 10 months after a deadline for doing so imposed by BLM, it is properly rejected.

Outdoor Adventure River Specialists, Inc., 41 IBLA 132 (June 14, 1979)

Where a Native allotment application is filed before the death of an applicant, proof of the applicant's use and occupancy, if otherwise timely, may be filed by the appropriate official of the Bureau of Indian Affairs pursuant to 43 CFR 2561.2(a) after the applicant's death. A decision rejecting the application because the proof was filed after the applicant's death must be set aside where the proof is not inconsistent with the application. Further proceedings must be served upon the heirs, known or unknown, by appropriate service, and also upon conflicting claimants, such as the State of Alaska.

Ernest L. Olson, Jr. (Deceased), 41 IBLA 179 (June 22, 1979)

APPLICATIONS AND ENTRIES--Continued

GENERALLY--Continued

An application for permit to drill for oil and gas in a designated Potash Area is properly denied where the applicant fails to show that his application comes within either of the two exceptions to the policy in favor of potash development enunciated in an Order of the Secretary, dated Oct. 7, 1975, 40 FR 51486.

Belco Petroleum Corp., 42 IBLA 150 (Aug. 16, 1979)

Pending applications for rights-of-way filed under the Acts of Feb. 15, 1901, and Mar. 4, 1911, shall be considered as applications under the Federal Land Policy and Management Act of 1976.

New England Fish Co., 42 IBLA 200 (Aug. 22, 1979)

Under the Federal Land Policy and Management Act of 1976, § 314, 43 U.S.C. § 1744 (1976), the owner of unpatented mining claims located in 1977 must file an affidavit of assessment work or a notice of intention to hold the claim prior to Dec. 31 of the following calendar year, 1978, or the claim will be conclusively deemed to have been abandoned. Where an appellant asserts on appeal that he timely mailed proof of labor to the Bureau of Land Management, but the documents were not received by that office, the documents cannot be considered as filed with that office unless and until they are received by it.

John Newkirk et al., 42 IBLA 292 (Aug. 27, 1979)

James E. Yates, 42 IBLA 391 (Sept. 11, 1979)

BLM personnel may not attempt to "correct," complete, or interpret entries on oil and gas lease offer application forms in such a way as to perfect an otherwise unacceptable application, nor may an applicant "cure" a defect on his drawing entry card by the submission of supplemental information after the drawing.

Resources Exploration & Mining, Inc. (On Reconsideration), 43 IBLA 89 (Sept. 19, 1979)

FILING

Rights may be established by occupancy of a trade and manufacturing site on vacant, unappropriated public domain in Alaska and filing of a notice of location thereof, despite a prior survey pursuant to a petition for survey of townsite lands, when the notice of location and occupancy of the claim for trade and manufacturing precedes settlement and occupancy under the townsite laws.

Carl A. Line, 40 IBLA 63 (Mar. 16, 1979)

Under the Federal Land Policy and Management Act of 1976, § 314, 43 U.S.C. § 1744 (1976), the owner of unpatented mining claims located in 1977 must file an affidavit of assessment work or a notice of intention to hold the claim prior to Dec. 31 of the following calendar year, 1978, or the claim will be conclusively deemed to have been abandoned. Where an appellant asserts on appeal that he timely mailed proof of labor to the Bureau of Land Management, but the documents were not received by that office, the documents cannot be considered as filed with that office unless and until they are received by it.

John Newkirk et al., 42 IBLA 292 (Aug. 27, 1979)

James E. Yates, 42 IBLA 391 (Sept. 11, 1979)

APPLICATIONS AND ENTRIES--Continued

FILING--Continued

The Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976), repealed the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970), with the exception of applications pending on Dec. 18, 1971. A State Office decision rejecting a Native allotment application for an additional parcel of land filed pursuant to the Act of May 17, 1906, after Dec. 18, 1971, will be affirmed. Equitable adjudication, which requires substantial compliance with the law, will not be invoked where there is no evidence that such an application was timely filed with BIA.

Nora L. Sanford, 43 IBLA 74 (Sept. 19, 1979)

INHERITABILITY

Where an applicant with first priority dies after filing an oil and gas lease application but prior to issuance of the lease, his personal representative, heirs, or devisees are entitled to the lease provided there is filed in all cases an offer to lease in compliance with 43 CFR 3102.8. Such offer will be effective as of the date of the original lease offer filed by the deceased.

Lamar M. Richardson, Jr., 42 IBLA 333 (Aug. 30, 1979)

RIGHTS OF WIDOWS, HEIRS, OR DEVISEES

Where a Native allotment application is filed before the death of an applicant, proof of the applicant's use and occupancy, if otherwise timely, may be filed by the appropriate official of the Bureau of Indian Affairs pursuant to 43 CFR 2561.2(a) after the applicant's death. A decision rejecting the application because the proof was filed after the applicant's death must be set aside where the proof is not inconsistent with the application. Further proceedings must be served upon the heirs, known or unknown, by appropriate service, and also upon conflicting claimants, such as the State of Alaska.

Ernest L. Olson, Jr. (Deceased), 41 IBLA 179 (June 22, 1979)

VALID EXISTING RIGHTS

Without adequate proof of a tender of a notice of location or application to purchase a headquarters site which was wrongfully denied by Bureau of Land Management personnel prior to a withdrawal of the land, the mere occupancy of land prior to the withdrawal did not create a "valid existing right" excepted from the effect of the withdrawal, and an application to purchase a headquarters site filed after the withdrawal is properly rejected.

Rene P. Lamoureux d/b/a Frenchy Lamoureux, 39 IBLA 36 (Jan. 15, 1979)

Rights may be established by occupancy of a trade and manufacturing site on vacant, unappropriated public domain in Alaska and filing of a notice of location thereof, despite a prior survey pursuant to a petition for survey of townsite lands, when the notice of location and occupancy of the claim for trade and manufacturing precedes settlement and occupancy under the townsite laws.

Carl A. Line, 40 IBLA 63 (Mar. 16, 1979)

APPLICATIONS AND ENTRIES--Continued

VESTED RIGHTS

The filing of an application does not itself create a vested property interest or right. It creates at most merely a hope or expectation.

Southern California Motorcycle Club, Inc., Sierra Club, 42 IBLA 164 (Aug. 17, 1979)

APPRAISALS

As used in 43 CFR 2802.1-7, "fair market value" of a communication site right-of-way is the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the right to use the site would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user who desired but is not obligated to so use.

The comparable lease method of appraisal of microwave communication sites, which involves the comparison of comparable rental data from other leased sites with data from the subject site, is the preferred method of determining the fair market rental value of the right-of-way where there is sufficient comparable data available.

Appraisals of rights-of-way for communication sites will be upheld if no error is shown in the appraisal methods used by the Bureau of Land Management and the appellant fails to show by convincing evidence that the charges are excessive. Where an appellant has raised sufficient doubt that the Bureau properly considered the highest and best use of a right-of-way in determining comparability of other sites as a basis for the use charges, the case may be remanded for the Bureau to reconsider whether a further appraisal or adjustments in the appraised values should be made.

Where a grantee seeks renewal of a right-of-way for a communication site, the Bureau of Land Management should require an advance annual payment at the rate formerly charged until a new fair market value rate may be established by appraisal. In the absence of contrary directives, the guideline in 43 CFR 2802.1-7(e) should be applied to renewals of existing rights-of-way. Increased charges may not be imposed retroactively, but may be only imposed by the authorized officer, after reasonable notice and opportunity for hearing, beginning with the next charge year after the officer's decision.

Interest may be imposed on use charges for right-of-way sites depending on considerations of fairness and equity. In the absence of contrary directives, interest may be imposed for occupancy of a site where use charges should have been imposed at the same rate as past permitted use. Also, interest may be imposed on increased charges for the period commencing with the date from which increased charges are established.

Under sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C.A. § 1764(g) (West Supp. 1978), payments for use of right-of-way sites should be on an annual basis at the fair market value unless the annual payment would be less than $100. Therefore, although lands may be appraised for a longer future period of time, lump-sum payments for fnture years may not be demanded for amounts exceeding the statutory amount; instead charges for such amounts should be made on an annual basis.

Donald R. Clark, C. Reinhart & Son, Inc., Hartwell Excavating Co., 39 IBLA 182 (Jan. 31, 1979)

ASSISTANT SECRETARIES OF THE INTERIOR

A decision by the Bureau of Land Management canceling fee simple patents issued to Indians and simultaneously issuing new Indian trust patents is not subject to review by the Board of Land Appeals, which has no jurisdiction in the matter, where the decision was made at the direction of the Assistant Secretary for Indian Affairs.

Blue Star, Inc., Atomic Western, Inc., Fremont Energy Corp., Ivor Adair, 41 IBLA 333 (July 11, 1979)

ATTORNEYS-

The Department has determined that an official of the Bureau of Indian Affairs is not entitled to represent a Native allotment applicant in an appeal to the Board of Land Appeals. However, where the case involves the propriety of proofs submitted by the Bureau of Indian Affairs in behalf of a deceased Native allotment applicant, that issue may be resolved.

Ernest L. Olson, Jr. (Deceased), 41 IBLA 179 (June 22, 1979)

The Department has determined that an official of the Bureau of Indian Affairs is not entitled to represent a Native allotment applicant in an appeal to the Board of Land Appeals. However, where the partial rejection of an Alaska Native allotment application turns on the resolution of a factual issue, the case will be remanded to BLM so that heirs or claimants to the estate of the deceased applicant may be afforded notice and opportunity for hearing.

Unknown Heirs of Migley Kelly, 41 IBLA 387 (July 24, 1979)

Failure to obtain counsel at a hearing into the validity of a mining claim will afford the mining claimant no greater rights on appeal than if he had obtained counsel.

United States v. Howard D. Long, Dolores M. Killion, 43 IBLA 150 (Sept. 28, 1979)

AUTHORITY TO BIND GOVERNMENT

The burden of signing and fully executing a drawing entry card rests on the applicant. Reliance on instructions provided by a non-governmental filing service does not excuse the failure to fully execute a card.

Walter B. Moore, Jr., 41 IBLA 95 (June 4, 1979)

BOUNDARIES-

The primary rule which the courts apply in construing and interpreting a conveyance where the location of the boundary lines is uncertain by reason of inconsistent or conflicting descriptive calls in the conveyance is that the intention of the parties controls and is to be followed. Where the calls for the location of boundaries to land are inconsistent, calls to monuments, natural or artificial, are of paramount importance and will prevail over all other calls inconsistent therewith. Calls to boundaries are of seccudary importance, and courses and distances must be altered if, as given, they will not reach the designated boundary. Calls of course take precedence over distances, so that where it is necessary to either change direction to reach a

BOUNDARIES--Continued

boundary or else reduce or extend the prescribed distance, the distance must yield to the course. The recital of quantity or area of land conveyed or retained will be least influential.

United States v. Leroy S. Johnson et al., 39 IBLA 337 (Feb. 28, 1979)

BUREAU OF INDIAN AFFAIRS

ADMINISTRATIVE APPEALS

Acts of Agents of the United States

Limitation on Authority to Act

Generally

Mailing to the Bureau of Indian Affairs a carbon copy of a decision rejecting an application for an Alaska Native allotment is not service upon the applicant so as to comply with 43 CFR 4.401.

Gust J. Reft, Sr., 42 IBLA 86 (Aug. 13, 1979)

BUREAU OF LAND MANAGEMENT

Erroneous issuance by BLM of oil and gas lease on other withdrawn land in area of tract for which appellant submitted lease offer does not effect restoration to leasing of latter withdrawn tract.

F. M. Tully, 39 IBLA 137 (Jan. 29, 1979)

Where the Secretary has declined to exercise his jurisdiction, a decision rendered by this Board is final for the Department. Hence, statements by BLM and arguments of the Solicitor, while valuable to the Board, are not binding upon the Board.

H. R. Delasco, Inc., et al., 39 IBLA 194 (Feb. 2, 1979)

Established and longstanding Departmental policy relating to the administration of the simultaneous oil and gas leasing system, premised upon regulatory interpretation, is binding on all employees of the Bureau of Land Management, until such time as it is properly changed.

Milton D. Feinberg, Benson J. Lamp (On Reconsideration), 40 IBLA 222 (Apr. 11, 1979) 86 I.D. 234

BUREAU OF RECLAMATION

ENVIRONMENT

The requirement for a permit under sec. 404 of the Federal Water Pollution Control Act applies to the Bureau of Reclamation to the same extent as any other person, and with certain exceptions the Bureau must obtain a permit from the Corps of Engineers prior to any discharge of dredged or fill material into the navigable waters.

Activities "affirmatively authorized by Congress," which are excepted from sec. 10 of the Rivers and Harbors Act of 1899, are not excepted from sec. 404

BUREAU OF RECLAMATION--Continued

ENVIRONMENT--Continued

of the Federal Water Pollution Control Act. Notwithstanding the exception of a discharge of dredged or fill material under sec. 10 of the Rivers and Harbors Act, compliance with sec. 404 is required.

A permit under sec. 404 of the Federal Water Pollution Control Act is required for the discharge of dredged or fill material whenever: (a) the "discharge" constitutes any addition of any pollutant to navigable waters from any discernible, confined and discrete conveyance, including the placement of fill and the building of any structure or impoundment; and (b) the "dredged material" is dredged spoil that is excavated or dredged from the waters of the United States; or (c) the "fill material" includes any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body, including any structure which requires rock, sand, dirt or other material for its construction; and (d) the discharge is made into "waters of the United States," which extend beyond those waters meeting the traditional tests of navigability to those encompassed by the broadest possible constitutional interpretation.

To secure the exemption under sec. 404(r) of the Federal Water Pollution Control Act for projects described in an environmental statement, compliance with seven specific conditions is required. The exemption does not apply to the maintenance of existing Federal projects, but only to new construction. While the exemption provides an alternative procedure to achieve compliance with sec. 404 of the Act for a limited category of Federal projects under very specific conditions, it does not lessen the substantive requirements that apply to the discharge of dredged or fill material.

To secure the exemption under sec. 404(f)(1) of the Federal Water Pollution Control Act for the maintenance of currently serviceable structures, compliance with four specific conditions is required. The exemption does not apply to the discharge of dredged material incident to maintenance dredging, or to new construction.

Permit Requirements for Discharge of Dredged or Fill Material Under Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. § 1344, M-36915 (Aug. 27, 1979) 86 I.D. 400

EXCESS LANDS

Sec. 46 of the Omnibus Adjustment Act of 1926, 43 U.S.C. § 423e (1976), requires the Secretary of the Interior to control and approve the purchase price of both initial sales of excess land, and resales of this formerly excess land until one-half the construction charges allocated to such land has been paid, in order for the land to continue to be eligible for project water.

In approving the sale price of formerly excess land until one-half the construction charges allocated to such land has been paid, the Secretary of the Interior is required to use the same standard used for approving the sale price of the initial sale of excess land; that is, the sale price must be fixed by the Secretary on the basis of the actual bona fide value of the land on the date of appraisal without reference to the value added by the project. The price approval requirement will not apply to formerly excess lands which were acquired, with Secretarial approval, from excess into non-excess status prior to May 18, 1979, the date of this opinion.

Reclamation Law -- Control of the Sale Price of Formerly Excess Lands, M-36913 (May 18, 1979) 86 I.D. 306

CLASSIFICATION AND MULTIPLE USE ACT OF 1964

Where the Secretary by appropriate notice in the Federal Register has classified certain lands for multiple use management and such lands are segregated from desert land entry, and the classification has not been terminated by either a reclassification or publication in Federal Register of termination of classification, BLM properly denied petition-application for desert land entry.

Paul M. Jenkins, 39 IBLA 141 (Jan. 29, 1979)

Melvin V. Frandsen, Mary C. Frandsen, 43 IBLA 130 (Sept. 26, 1979)

Classification of lands under the Classification and Multiple Use Act of 1964, 43 U.S.C. § 1411 et seq. (1970), does not create reserved water rights.

Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914 (June 25, 1979) 86 I.D. 553

COAL LEASES AND PERMITS

APPLICATIONS

Where a court decree delineates specific criteria governing the issuance of Federal coal leases by the Department, the rejection of competitive coal lease applications failing to meet such criteria will be sustained on appeal.

W. K. and R. D. Somerville, 40 IBLA 9 (Mar. 9, 1979)

Where the case record contains no documentation supporting BLM's conclusion that an applicant for a coal lease does not meet emergency coal leasing criteria, and where the applicant asserts on appeal that it can produce evidence establishing that it does meet these criteria, BLM's decision rejecting the application will be vacated, and the matter will be remanded to allow the applicant a reasonable time to provide this evidence.

Mid-Continent Coal and Coke Co., 41 IBLA 139 (June 14, 1979)

Where BLM has rejected a coal lease application because it does not meet court-ordered emergency coal leasing criteria and the record indicates that the applicant should have been given the opportunity to submit additional evidence in support of its application, the rejection will be vacated and the matter remanded to BLM to allow the applicant a reasonable time to provide this evidence. However, where as in this case, the emergency criteria are no longer in effect and regulations governing a new coal management program have been issued, BLM on remand should determine whether it should issue a coal lease to the applicant under the new program, giving the applicant an opportunity to provide additional information if necessary.

Coal Fuels-Wilde, 43 IBLA 170 (Sept. 28, 1979)

LEASES

The Secretary may, in computing the fair market value of coal to be leased competitively under privately owned surface, assume a limited surface owner consent cost, based on losses and costs to the surface estate and operation and similar evaluations, regardless of

COAL LEASES AND PERMITS--Continued

LEASES--Continued

the actual price paid or the amount which a surface owner could otherwise demand for consent.

Assumption of a limited surface owner consent cost to be used in place of actual cost in the computation of fair market value of coal to be leased competitively is necessary to ensure receipt of fair market value by the public as required by 30 U.S.C. § 201(a) (1976).

In the exercise of his discretion to lease under the Mineral Leasing Act, the Secretary has authority to decline to issue a coal lease where surface owner consent costs prevent the public from realizing a fair return on the value of the coal.

Coal Leasing Program -- Relationship of the Cost of Surface Owner Consent to Receipt of Fair Market Value for Federally Owned Coal, M-36909 (Jan. 15, 1979) 86 I.D. 28

Where a court decree delineates specific criteria governing the issuance of Federal coal leases by the Department, the rejection of competitive coal lease applications failing to meet such criteria will be sustained on appeal.

W. K. and R. D. Somerville, 40 IBLA 9 (Mar. 9, 1979)

BLM may properly readjust a coal lease issued pursuant to the terms of sec. 7, Mineral Leasing Act, 30 U.S.C. § 207 (1970), within a reasonable time after expiration of its 20-year period with or without notice by BLM to the lessee prior to expiration of the 20-year period.

The failure of BLM to readjust a coal lease issued pursuant to the terms of sec. 7, Mineral Leasing Act, 30 U.S.C. § 207 (1970), prior to or immediately after expiration of its 20-year period does not constitute a waiver of BLM's right to readjust said lease.

BLM is not estopped to readjust a coal lease issued pursuant to the terms of sec. 7, Mineral Leasing Act, 30 U.S.C. § 207 (1970), by its failure to readjust said lease prior to or immediately after expiration of its 20-year period.

BLM's readjustment of a coal lease issued pursuant to the terms of sec. 7, Mineral Leasing Act, 30 U.S.C. § 207 (1970), after expiration of the 20-year lease term does not violate a lessee's rights under the fifth amendment of the United States Constitution.

BLM's readjustment of a coal lease issued pursuant to the terms of sec. 7, Mineral Leasing Act, 30 U.S.C. § 207 (1970), after expiration of the 20-year term does not violate the Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21(a) (1976), national policy in favor of coal development, and a certain cooperative agreement between the State of Wyoming and the Department of the Interior.

California-Portland Cement Co., Rosebud Coal Sales Co., 40 IBLA 339 (May 10, 1979)

Where BLM has rejected a coal lease application because it does not meet court-ordered emergency coal leasing criteria and the record indicates that the applicant should have been given the opportunity to submit additional evidence in support of its application, the rejection will be vacated and the matter remanded to BLM to allow the applicant a reasonable time to provide this evidence. However, where as in this case, the emergency criteria are no longer in effect and regulations governing a new coal management program have been issued, BLM on remand should determine whether it should issue a coal lease to the applicant under the new program, giving the applicant an opportunity to provide additional information if necessary.

Coal Fuels-Wilde, 43 IBLA 170 (Sept. 28, 1979)

ROYALTIES

In determining the amount of royalty due to the United States under a Federal coal lease, it is proper for U.S. Geological Survey to include the amount of the reclamation fee imposed by the Surface Mining Control and Reclamation Act of 1977 as part of the gross value of production where the selling price received at the point of shipment to market is increased by that amount.

Knife River Coal Mining Co., 43 IBLA 104 (Sept. 24, 1979) 86 I.D. 472

COLOR OR CLAIM OF TITLE

GENERALLY

To satisfy the requirements of a class 1 claim under the Color of Title Act, "valuable improvements" must exist on the land at the time the application is filed, or it must be shown that the land has been reduced to cultivation. If land was once cultivated, but is not cultivated at the time the application was filed and has not been cultivated for 10 years previously, the cultivation requirement of the Act has not been satisfied.

The burden of proving a valid color of title claim is on the claimant. Where it cannot be said from the evidence presented that the grantors and grantees in the claimant's chain of title acquired a parcel of land with the bona fide belief that the parcel included all the land claimed, the color of title application must be denied.

Mable M. Farlow (On Reconsideration after Hearing), 39 IBLA 15 (Jan. 11, 1979) 86 I.D. 22

Use of a formula, based solely on the longevity of an applicant's acquisition of title or possession, in determining the purchase price of a parcel of land under the Color of Title Act does not fulfill the Congressional mandate to consider and give full effect to the equities of the applicant. Each applicant's application and equities must be considered on its own merits.

Where an Act of Congress prescribed a purchase price for land to a certain group of claimants of land omitted from the original surveys, that Congressional determination of equities should be considered by the Bureau of Land Management in assessing the deduction for equities from the appraised value of land to be sold under the Color of Title Act.

Ralph and Ruth Dickinson, 39 IBLA 258 (Feb. 15, 1979)

Where title to public land is claimed pursuant to the provisions of the Color of Title Act, 43 U.S.C. § 1068 (1976), instrnments of conveyance used to establish chain of title need only provide in some legally recognized manner for conveyance of the land such that the claimant is invested with color of title. A residuary clause in a judicial decree distributing property of an estate is snfficient to constitnte chain of title.

The provisions of the Color of Title Act, 43 U.S.C. § 1068 (1976), apply only where a tract of "public land" is held in peaceful adverse possession and the other statntory requirements are satisfied. Where a

COLOR OR CLAIM OF TITLE--Continued

GENERALLY--Continued

homestead entry of record, valid on its face, has been made on public land and accepted by the proper land authorities, an equitable interest in favor of the entrant will be deemed to arise but the land will not be divested of its status as "public land."

Benton C. Cavin, 41 IBLA 268 (June 28, 1979)

The burden of establishing a valid color of title claim is on the claimant.

An applicant who believes or has reason to believe that title to land is in the United States at the time when he acquires it does not hold color of title in good faith.

Joe I. Sanchez and Celina V. Sanchez, et al., 42 IBLA 176 (Aug. 22, 1979)

APPLICATIONS

An applicant who believes or has reason to believe that title to land is in the United States at the time when he acquires it does not hold color of title in good faith.

Joe I. Sanchez and Celina V. Sanchez, et al., 42 IBLA 176 (Aug. 22, 1979)

APPRAISED VALUE

Use of a formula, based solely on the longevity of an applicant's acquisition of title or possession, in determining the purchase price of a parcel of land under the Color of Title Act does not fulfill the Congressional mandate to consider and give full effect to the equities of the applicant. Each applicant's application and equities must be considered on its own merits.

Where an Act of Congress prescribed a purchase price for land to a certain group of claimants of land omitted from the original surveys, that Congressional determination of equities should be considered by the Bureau of Land Management in assessing the deduction for equities from the appraised value of land to be sold under the Color of Title Act.

Ralph and Ruth Dickinson, 39 IBLA 258 (Feb. 15, 1979)

Where the purchase price for a tract of land applied for under the Color of Title Act is based upon a Bureau of Land Management appraisal of the fair market value of the land at the date of appraisal, and no allowance is made for equitable factors which appear on the record in favor of the applicant, the case will be remanded to the Bureau of Land Management for consideration of such equities.

Gerald Baehler, 42 IBLA 36 (July 31, 1979)

CULTIVATION

To satisfy the requirements of a class 1 claim under the Color of Title Act, "valuable improvements" must exist on the land at the time the application is filed, or it must be shown that the land has been reduced to cultivation. If land was once cultivated, but is not cultivated at the time the application was filed and has not been cultivated for 10 years previously, the

COLOR OR CLAIM OF TITLE--Continued

CULTIVATION--Continued

cultivation requirement of the Act has not been satisfied.

Mable M. Farlow (On Reconsideration after Hearing), 39 IBLA 15 (Jan. 11, 1979) 86 I.D. 22

DESCRIPTION OF LAND

While the general rule is that a color of title claim must be based on a deed or other written instrument which on its face purports to convey the land sought, extrinsic evidence may be used to make definite the description in a deed which contains a latent ambiguity.

Where extrinsic evidence does not adequately show that predecessors in a color of title claimant's chain of title, whose holdings must be tacked on to establish the requisite 20 years holding for a class 1 claim, could have a bona fide basis for believing that land described as lot 5, shown on the official Government plat on one side of a river, included land on the opposite side of the river, there could not be a good faith holding under color of title.

Mable M. Farlow (On Reconsideration after Hearing), 39 IBLA 15 (Jan. 11, 1979) 86 I.D. 22

Where title to public land is claimed pursuant to the provisions of the Color of Title Act, 43 U.S.C. § 1068 (1976), instruments of conveyance used to establish chain of title need only provide in some legally recognized manner for conveyance of the land such that the claimant is invested with color of title. A residuary clause in a judicial decree distributing property of an estate is sufficient to constitute chain of title.

Benton C. Cavin, 41 IBLA 268 (June 28, 1979)

GOOD FAITH

Where extrinsic evidence does not adequately show that predecessors in a color of title claimant's chain of title, whose holdings must be tacked on to establish the requisite 20 years holding for a class 1 claim, could have a bona fide basis for believing that land described as lot 5, shown on the official Government plat on one side of a river, included land on the opposite side of the river, there could not be a good faith holding under color of title.

Mable M. Farlow (On Reconsideration after Hearing), 39 IBLA 15 (Jan. 11, 1979) 86 I.D. 22

An applicant who believes or has reason to believe that title to land is in the United States at the time when he acquires it does not hold color of title in good faith.

Joe I. Sanchez and Celina V. Sanchez, et al., 42 IBLA 176 (Aug. 22, 1979)

IMPROVEMENTS

To satisfy the requirements of a class 1 claim under the Color of Title Act, "valuable improvements" must exist on the land at the time the application is filed, or it must be shown that the land has been reduced to cultivation. If land was once cultivated, but is not cultivated at the time the application was filed and has not been cultivated for 10 years previously, the

COLOR OR CLAIM OF TITLE--Continued

IMPROVEMENTS--Continued

cultivation requirement of the Act has not been satisfied.

Mable M. Farlow (On Reconsideration after Hearing), 39 IBLA 15 (Jan. 11, 1979) 86 I.D. 22

COMMUNICATION SITES

As used in 43 CFR 2802.1-7, "fair market value" of a communication site right-of-way is the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the right to use the site would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user who desired but is not obligated to so use.

The comparable lease method of appraisal of microwave communication sites, which involves the comparison of comparable rental data from other leased sites with data from the subject site, is the preferred method of determining the fair market rental value of the right-of-way where there is sufficient comparable data available.

Appraisals of rights-of-way for communication sites will be upheld if no error is shown in the appraisal methods used by the Bureau of Land Management and the appellant fails to show by convincing evidence that the charges are excessive. Where an appellant has raised sufficient doubt that the Bureau properly considered the highest and best use of a right-of-way in determining comparability of other sites as a basis for the use charges, the case may be remanded for the Bureau to reconsider whether a further appraisal or adjustments in the appraised values should be made.

Where a grantee seeks renewal of a right-of-way for a communication site, the Bureau of Land Management should require an advance annual payment at the rate formerly charged until a new fair market value rate may be established by appraisal. In the absence of contrary directives, the guideline in 43 CFR 2802.1-7(e) should be applied to renewals of existing rights-of-way. Increased charges may not be imposed retroactively, but may be only imposed by the authorized officer, after reasonable notice and opportunity for hearing, beginning with the next charge year after the officer's decision.

Under sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C.A. § 1764(g) (West Supp. 1978), payments for use of right-of-way sites should be on an annual basis at the fair market value unless the annual payment would be less than $100. Therefore, although lands may be appraised for a longer future period of time, lump-sum payments for future years may not be demanded for amounts exceeding the statutory amount; instead charges for such amounts should be made on an annual basis.

Where there are multiple users on the same communication site each user is individually responsible for the fair market rental value of his authorized use.

The notice and opportunity for hearing envisaged by 43 CFR 2802.1-7(e) requires at a minimum that the lessee be provided with a copy of the appraisal report, that he be permitted to appear before the decisionmaker, that the decisionmaker not be the person who made or approved the appraisal, and that adequate records of the hearing conducted pursuant to the regulations be maintained.

Donald R. Clark, C. Reinhart & Son, Inc., Hartwell Excavating Co., 39 IBLA 182 (Jan. 31, 1979)

CONSTITUTIONAL LAW

GENERALLY

Under the Supremacy Clause, U.S. CONST., art. VI, cl. 2, Federal laws, including Federal grazing regulations, override conflicting State laws with respect to public lands.

Colvin Cattle Co., Inc., 39 IBLA 176 (Jan. 30, 1979)

Under the United States Constitution, States have no power over disposition of Federal property.

Ralph and Ruth Dickinson, 39 IBLA 258 (Feb. 15, 1979)

BLM's readjustment of a coal lease issued pursuant to the terms of sec. 7, Mineral Leasing Act, 30 U.S.C. § 207 (1970), after expiration of the 20-year lease term does not violate a lessee's rights under the fifth amendment of the United States Constitution.

California Portland Cement Co., Rosebud Coal Sales Co., 40 IBLA 339 (May 10, 1979)

Under the Property Clause, Congress has the power to control the disposition and use of water on, under, or appurtenant to original public domain lands, and it is not lightly inferred that this power has been exercised.

Federal control over the disposition and use of water in, on, under or appurtenant to Federal land ultimately rests on the Supremacy Clause, which permits the Federal Government to exercise its constitutional prerogatives without regard to State law.

Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914 (June 25, 1979) 86 I.D. 553

A provision of State law, relating to assessment work on mining claims, which is more liberal than the requirements of Federal law, cannot override such Federal law. Article IV, § 3, cl. 2, of the Federal Constitution vests in the Congress authority to promulgate appropriate laws governing the public lands and other property of the United States.

Bruce Parke, 42 IBLA 18 (July 25, 1979)

Department of the Interior, as agency of executive branch of Government, is not proper forum to decide whether or not as to mining claims the recordation provisions of the Federal Land Policy and Management Act of 1976 are constitutional.

Charlie Carnal, Walter Peck, and Edward Borzansky, 43 IBLA 10 (Sept. 11, 1979)

DUE PROCESS

BLM's readjustment of a coal lease issued pursuant to the terms of sec. 7, Mineral Leasing Act, 30 U.S.C. § 207 (1970), after expiration of the 20-year lease term does not violate a lessee's rights under the fifth amendment of the United States Constitution.

California Portland Cement Co., Rosebud Coal Sales Co., 40 IBLA 339 (May 10, 1979)

CONSTITUTIONAL LAW--Continued

DUE PROCESS--Continued

"Person." Regulation 43 CFR 4.450-1 specifically gives persons with an adverse interest in land a right to contest the adverse claim. It does not depend on the applicability of the dne process clause of the Constitution to either claimant. A State is a "person" within the meaning of this private contest regulation.

State of Alaska, 42 IBLA 1 (July 25, 1979)

CONTESTS AND PROTESTS

GENERALLY

Failure to file a timely answer to a mining claim contest complaint will result in the charges in the complaint being taken as admitted and the case being decided without a hearing. Where contestees deny the allegations in the complaint only as to 4 claims but not as to 15 other claims addressed in the complaint, the complaint will be taken as admitted as to the 15 claims not addressed in the answer to the complaint.

Where contestees in a mining claim contest file a timely answer to the contest complaint, this answer is efficacious as to any other contestees who are members of his family if it appears on the face of the answer that they wish to retain their interests, if any, in the claims, as the contestees who answered may be regarded as having done so on their family members' behalf. In these circumstances, these other contestees are properly regarded as having answered the complaint, absent any manifestation of a contrary intent.

Where a contestee makes a timely response to a Government complaint in a mining contest which is sufficient to raise a justiciable controversy, the allegations then cannot be taken as admitted and the mining claim(s) cannot be declared null and void without a hearing.

United States v. Jerry Prock et al., 39 IBLA 148 (Jan. 29, 1979)

Regulation 43 CFR 4.450-1 gives a person with an adverse interest in land a right to contest an adverse claim. The Department of the Interior has consistently recognized States as included within the term "person" within the meaning of the regulation, allowing them to initiate private contests.

Where the State of Alaska has shown an interest in land in its existing airport, it may bring a private contest to challenge Native allotment applications for land in conflict with the airport.

State of Alaska, 40 IBLA 79 (Mar. 22, 1979)

The State of Alaska will be afforded time within which to bring private contests against Native allotment applications conflicting with an existing airport runway built by the State and to show it has standing to contest. If it does so timely, the Bureau of Land Management will adjudicate its standing as a contestant and the contests will proceed if it finds affirmatively. If not, the State's timely objections will be taken as a protest and a factfinding hearing will be held. If the State fails to take timely action, a decision rejecting its application to reinstate a conflicting airport lease application will stand.

State of Alaska, 40 IBLA 118 (Mar. 27, 1979)

CONTESTS AND PROTESTS--Continued

GENERALLY--Continued

Where the Bureau of Land Management determines that an Alaska Native allotment application should be rejected because the land was not used and occupied by the applicant, the BLM shall issue a contest complaint pursuant to 43 CFR 4.451 et seq. Upon receiving a timely answer to the complaint, which answer raises a disputed issue of material fact, the Bureau will forward the case file to the Hearings Division, Office of Hearings and Appeals, Department of the Interior, for assignment of an administrative law judge, who will proceed to schedule a hearing, at which the applicant may produce evidence to establish entitlement to his allotment.

John Moore et al., 40 IBLA 321 (Apr. 30, 1979) 86 I.D. 279

Where an applicant for an Alaska Native allotment was a minor at the time she alleges the initial use and occupancy of the land, but not so young as to preclude any possibility that she was then capable of doing so as an independent citizen in her own right to the potential exclusion of others, prior to rejection of her application on the basis of her youth BLM should provide notice and an opportunity for hearing.

Nellie Boswell Beecroft, 41 IBLA 70 (May 31, 1979)

Where Bureau of Land Management determines an application for a Native allotment should be rejected for failure to establish use and occupancy of the land, Bureau of Land Management should initiate a contest proceeding pursuant to 43 CFR 4.451 et seq.

Frederick Phillips et al., 41 IBLA 169 (June 22, 1979)

Ella S. Sheldon et al., 42 IBLA 276 (Aug. 27, 1979)

Where the Bureau of Land Management (BLM) determines that an Alaska Native allotment application should be rejected in part because the Native did not use all of the land applied for, the BLM shall initiate a contest proceeding pursuant to 43 CFR 4.451 et seq.

Frank Rulland, 41 IBLA 207 (June 27, 1979) 86 I.D. 342

Failure to file a timely answer to a mining claim contest complaint will result in the charges in the complaint being taken as admitted and the case being decided without a hearing.

United States v. James Hawkeswood et al., 41 IBLA 245 (June 27, 1979)

United States v. Edna Horstmeier, 42 IBLA 33 (July 26, 1979)

Where there is a conflict between an application by the State of Alaska to select land under the Statehood Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to BLM that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may not appeal from the "Notice," which is interlocutory, but it may initiate private contest proceedings to prove lack of qualification on the part of the Native, or it may appeal the subsequent decision of BLM to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient it will

CONTESTS AND PROTESTS--Continued

GENERALLY--Continued

order the institution of Government contest proceedings, but if it finds the allotment application acceptable, it will order the patent issued, if all else be regular.

State of Alaska, 41 IBLA 309 (July 5, 1979)

"Person." Regulation 43 CFR 4.450-1 specifically gives persons with an adverse interest in land a right to contest the adverse claim. It does not depend on the applicability of the due process clause of the Constitution to either claimant. A State is a "person" within the meaning of this private contest regulation.

State of Alaska, 42 IBLA 1 (July 25, 1979)

Where there is a conflict between an application by the State of Alaska to select land under the Statehood Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to BLM that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may not appeal from an interlocutory decision which authorizes the State to initiate private contest proceedings to prove lack of qualification on the part of the Native. Rather, it may initiate the private contest within the time period prescribed, or it may appeal the decision of BLM, after it becomes final, to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient it will order the institution of Government contest proceedings, but if it finds the allotment application acceptable, it will order the patent issued, if all else be regular.

Where it appears that a party did not realize that an election of remedies was mandated by Departmental procedures, a decision requiring the initiation of a private contest will be set aside, and the party will be permitted a period of time in which to initiate a private contest, or alternatively, waive such private contest and pursue a direct appeal on the question of whether a Government contest should issue.

State of Alaska et al., 42 IBLA 94 (Aug. 16, 1979)

Where an applicant for a Native allotment alleges for the first time on appeal his use and occupancy of lands prior to their withdrawal, a decision rejecting the Native's application shall be vacated and the case remanded to BLM for its consideration of appellant's new evidence.

Charles L. John, 42 IBLA 260 (Aug. 27, 1979)

Where there is a conflict between an application by the State of Alaska to select land under the Alaska Mental Health Enabling Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to the Bureau of Land Management that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may initiate private contest proceedings to prove lack of qualification on the part of the Native, or it may appeal the determination to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient, it will order the institution of Government contest proceedings. If, however, the Board affirms the finding that the requirements of patent have been met, the State will have no further administrative recourse. Where the State had not, prior to its appeal,

CONTESTS AND PROTESTS--Continued

GENERALLY--Continued

been afforded notice of the election, it should be afforded an opportunity to make such election.

State of Alaska v. Mattie B. Bartos, 42 IBLA 269 (Aug. 27, 1979)

State of Alaska v. Daniel Johnson, 42 IBLA 370 (Sept. 11, 1979) 86 I.D. 441

In a mining claim contest where a contestee is of the opinion that the Government did not make a prima facie case of no discovery, he may move to have the case dismissed at the conclusion of the Government's case and then rest. The contest complaint could be dismissed if the administrative law judge rules that no prima facie case had been made of lack of discovery and there is no other evidence in the record to support the charges in the complaint. But if the contestee goes forward after making such a motion to dismiss and presents his evidence, that evidence must be considered as part of the entire record and its probative value will be weighed. Thus, even if the Government has failed to make a prima facie case, evidence presented by the contestee which supports the Government's contest charges may be used against the contestee, regardless of the defects in the Government's case.

A sufficient prima facie case by the Government does not require positive proof that there has been no discovery made or that the mining claim is nonmineral in character. Upon the Government's presentation of a prima facie case, the burden shifts to the claimant to prove by a preponderance of the evidence that he indeed has a discovery of a valuable mineral deposit within the limits of the claim.

United States v. Andy Syndbad, 42 IBLA 313 (Aug. 29, 1979)

CONTRACTS

CONSTRUCTION AND OPERATION

Generally

When the Government could not require delivery of a refrigerated storage unit within the original delivery schedule because the building in which the unit was to be installed was not finished and the Government thereafter continued to negotiate changes in specifications and delivery dates with the contractor, the Board held that the Government had waived the original delivery schedule and that the Government did not regain the right to terminate the contract for default since there was no mutual agreement on a new delivery date and the Government's unilateral attempt to reestablish a specific contractual delivery date was unreasonable as not being within the performance capabilities of the contractor at the time the notice was given.

Appeal of Kenney Refrigeration, IBCA-1230-12-78 (Sept. 28, 1979) 86 I.D. 503

Actions of Parties

Where imponderables make it difficult to arrive at an accurate measurement of the amount of concrete placed under water, the Board finds that the amount represented by "paid for" concrete minus the amount of concrete admittedly wasted is the prefsrred method for determining the amount to which the contractor is entitled for the concrete so placed.

Where a contractor voluntarily signs directives specifying the payments to be made for the additional work

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Actions of Parties--Continued

ordered without taking any exception thereto, the unqualified acceptance of the directives involved is found to be binding upon the contractor to the extent of the direct costs entailed in performance of the additional work.

Appeal of William P. Bergan, Inc., IBCA-1130-11-76 (Feb. 2, 1979) 86 I.D. 65

Where the Government has accepted a bid conditioned upon the contractor not being prejudiced by changes resulting from energy related shortages and the parties agree in a change order to an increase in price for asphaltic materials, the Board finds the agreement does not constitute an accord and satisfaction precluding further price increases where the evidence shows there was no meeting of the minds and this was evident to the contracting officer prior to execution of the change order.

Nielsons, Inc., IBCA-1126-9-76 (Mar. 8, 1979) 86 I.D. 182

Under a CPFF contract requiring the completion of a report with on-going monthly Government review of completed portions by a small number of reviewers, the withholding of such review until a postcontract period and a significant expansion of the number of reviewers is found to constitute a change not subject to the specified cost ceiling. In the circumstances presented, the knowledge that the project office had greatly expanded the work of incorporating reviewers' comments into the contract report was imputed to the contracting officer.

Appeal of Recon Systems, Inc., IBCA-1214-9-78 (Sept. 25, 1979) 86 I.D. 478

Where the preponderance of the evidence shows that substantial increased costs were incurred by a highway construction contractor, primarily because Government inspection personnel either failed to calibrate or improperly calibrated the density testing machine used to determine compaction compliance, and it is determined that the contractor is entitled to an equitable adjustment, the Board will adopt the amount for quantum reached by the parties at a negotiated settlement, when dissatisfied with both the Government audit and the quantum computation of the contractor, but satisfied that the negotiations were made in good faith, at arm's length, and by individuals thoroughly familiar with the details of the contract and its performance.

Appeal of Nielsons, Inc., IBCA-1173-11-77 (Sept. 27, 1979) 86 I.D. 493

Allowable Costs

Under a CPFF contract requiring the completion of a report with on-going monthly Government review of completed portions by a small number of reviewers, the withholding of such review until a postcontract period and a significant expansion of the number of reviewers is found to constitute a change not subject to the specified cost ceiling. In the circumstances presented, the knowledge that the project office had greatly expanded the work of incorporating reviewers' comments into the contract report was imputed to the contracting officer.

Appeal of Recon Systems, Inc., IBCA-1214-9-78 (Sept. 25, 1979) 86 I.D. 478

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changed Conditions (Differing Site Conditions)

Where a clearing contractor claims entitlement to an equitable adjustment based on the standard Differing Site Conditions clause of the contract, and the evidence shows that the principal causes of any increased costs which may have been incurred were heavy rains and failure of the contractor to make a reasonable prebid investigation of the site or examination of specifications, and no evidence of fault on the part of the Government is presented, the Board holds that the contractor has not sustained its burden of proof for entitlement to an equitable adjustment, and the appeal will be denied.

Appeal of M & P Equipment Co., IBCA-1088-11-75 (Sept. 28, 1979) 86 I.D. 527

Changes and Extras

The state of the weather at any given time cannot be predicted with absolute certainty. Absent an express contractual assumption of the risk by the Government, the contractor must bear the risk of increases in the cost of the work caused by a flood.

Appeal of Brown & Root Western, Inc., IBCA-1220-10-78 (Apr. 13, 1979)

Where the Board finds that the Contracting Officer's Representative required the contractor to expend more effort in field surveys and data collection than required by the contract documents, a constructive change will be found to have occurred.

Appeal of Environment Consultants, Inc., IBCA-1192-5-78 (June 29, 1979) 86 I.D. 349

Under a CPFF contract requiring the completion of a report with on-going monthly Government review of completed portions by a small number of reviewers, the withholding of such review until a postcontract period and a significant expansion of the number of reviewers is found to constitute a change not subject to the specified cost ceiling. In the circumstances presented, the knowledge that the project office had greatly expanded the work of incorporating reviewers' comments into the contract report was imputed to the contracting officer.

Appeal of Recon Systems, Inc., IBCA-1214-9-78 (Sept. 25, 1979) 86 I.D. 478

Where the preponderance of the evidence shows that substantial increased costs were incurred by a highway construction contractor, primarily because Government inspection personnel either failed to calibrate or improperly calibrated the density testing machine used to determine compaction compliance, and it is determined that the contractor is entitled to an equitable adjustment, the Board will adopt the amount for quantum reached by the parties at a negotiated settlement, when dissatisfied with both the Government audit and the quantum computation of the contractor, but satisfied that the negotiations were made in good faith, at arm's length, and by individuals thoroughly familiar with the details of the contract and its performance.

Appeal of Nielsons, Inc., IBCA-1173-11-77 (Sept. 27, 1979) 86 I.D. 493

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changes and Extras--Continued

Where the Government does not issue a written change order and does not give a verbal order which is interpreted by the contractor as a change, no contract change has occurred and the contractor may submit materials conforming to the original specifications. The Government's mere exercise of its option to accept nonconforming goods does not in and of itself constitute a contract change.

Appeal of Nasatka & Sons, Inc., IBCA-1157-6-77
(Sept. 28, 1979) 86 I.D. 513

Construction Against Drafter

Where a prospective contractor does not spot hidden or subtle ambiguities in the bid documents, it is protected if it innocently and reasonably construes an ambiguity in its own favor.

Appeal of RHC Construction, Inc., IBCA-1207-9-78
(June 26, 1979)

Drawings and Specifications

Where the evidence clearly establishes that the Government specifications were defective in a number of respects but fails to show that many of the costs claimed are attributable to actions of the Government, the Board--noting that it is impossible to determine the amount to which the contractor is entitled with mathematical exactness--finds that the "jury verdict" method of determining the amount of the equitable adjustment is the most appropriate method in the circumstances presented by the instant appeal.

Appeal of William P. Bergan, Inc., IBCA-1130-11-76
(Feb. 2, 1979) 86 I.D. 65

Duty to Inquire

Where a clearing contractor claims entitlement to an equitable adjustment based on the standard Differing Site Conditions clause of the contract, and the evidence shows that the principal causes of any increased costs which may have been incurred were heavy rains and failure of the contractor to make a reasonable prebid investigation of the site or examination of specifications, and no evidence of fault on the part of the Government is presented, the Board holds that the contractor has not sustained its burden of proof for entitlement to an equitable adjustment, and the appeal will be denied.

Appeal of M & P Equipment Co., IBCA-1088-11-75
(Sept. 28, 1979) 86 I.D. 527

General Rules of Construction

When the contractor offers materials which the contracting officer discovers are not in total compliance with the specifications, the contracting officer may accept the material if he finds it to be in the best interests of the Government. That acceptance, however, is not final and conclusive if based on, or induced by, a misrepresentation of a material fact.

Appeal of Nasatka & Sons, Inc., IBCA-1157-6-77
(Sept. 28, 1979) 86 I.D. 513

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Labor Laws

When a contractor failed to furnish the number of laborers required under a service contract and failed to cure such deficiency after a notice to show cause why the contract should not be terminated for default, the Board held that termination for default was proper and further held that the Government should continue to withhold earnings under the contract to satisfy first the wage claims by unpaid employees of the contractor as determined by the Department of Labor pursuant to the Service Contract Act of 1965 and secondly to satisfy any claim for excess costs by the contracting agency.

Appeal of Andy's Excavating, IBCA-1236-12-78 (Sept. 19, 1979) 86 I.D. 469

Payments

Where impondérables make it difficult to arrive at an accurate measurement of the amount of concrete placed under water, the Board finds that the amount represented by "paid for" concrete minus the amount of concrete admittedly wasted is the preferred method for determining the amount to which the contractor is entitled for the concrete so placed.

Appeal of William P. Bergan, Inc., IBCA-1130-11-76
(Feb. 2, 1979) 86 I.D. 65

Privity of Contract

The prime contractor may appeal in its own name a claim asserted by its subcontractor. The subcontractor's rights to an equitable adjustment under the contract are no greater, however, than those of the prime contractor in whose name the appeal is taken.

Appeal of Brown & Root Western, Inc., IBCA-1220-10-78
(Apr. 13, 1979)

Waiver and Estoppel

When the Government could not require delivery of a refrigerated storage unit within the original delivery schedule because the building in which the unit was to be installed was not finished and the Government thereafter continued to negotiate changes in specifications and delivery dates with the contractor, the Board held that the Government had waived the original delivery schedule and that the Government did not regain the right to terminate the contract for default since there was no mutual agreement on a new delivery date and the Government's unilateral attempt to reestablish a specific contractual delivery date was unreasonable as not being within the performance capabilities of the contractor at the time the notice was given.

Appeal of Kenney Refrigeration, IBCA-1230-12-78
(Sept. 28, 1979) 86 I.D. 503

CONTRACT DISPUTES ACT OF 1978

Interest

Where a contractor's claim is not pending before the contracting officer on the effective date, Mar. 1, 1979, of the Contract Disputes Act of 1978, the contractor is ineligible, under sec. 16 thereof, to elect to proceed under the Act. Therefore, an appeal to the Board, involving a claim upon which the final decision of the contracting officer was issued prior to Mar. 1,

CONTRACTS--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Interest--Continued

1979, and seeking relief pursuant to sec. 12 of the Act, will be dismissed for lack of jurisdiction.

Appeal of L. M. Johnson, Inc., IBCA-1268-5-79 (Sept. 28, 1979) 86 I.D. 508

Jurisdiction

Where a contractor's claim is not pending before the contracting officer on the effective date, Mar. 1, 1979, of the Contract Disputes Act of 1978, the contractor is ineligible, under sec. 16 thereof, to elect to proceed under the Act. Therefore, an appeal to the Board, involving a claim upon which the final decision of the contracting officer was issued prior to Mar. 1, 1979, and seeking relief pursuant to sec. 12 of the Act, will be dismissed for lack of jurisdiction.

Appeal of L. M. Johnson, Inc., IBCA-1268-5-79 (Sept. 28, 1979) 86 I.D. 508

A contractor may not proceed under the provisions of the Contract Disputes Act of 1978 where the appeal is from a final decision of the contracting officer rendered and received by the appellant prior to the effective date of the Act.

Appeals of Gregory Lumber Co., Inc., IBCA-1237-12-78, 1238-12-78, 1239-12-78, 1240-12-78 (Sept. 28, 1979) 86 I.D. 520

DISPUTES AND REMEDIES

Burden of Proof

An appellant will be held to have failed to sustain its burden of proof and the appeal will be denied where appellant's case is submitted on the record without a hearing and the record consists only of claim letters and pleadings alleging that the contracting officer's findings of fact and decision are erroneous in certain respects. Disputed allegations do not constitute evidence and cannot be accepted as proof of facts.

Appeal of C.I.C. Construction Co., Inc., IBCA-1190-4-78 (Sept. 25, 1979) 86 I.D. 475

Where a clearing contractor claims entitlement to an equitable adjustment based on the standard Differing Site Conditions clause of the contract, and the evidence shows that the principal causes of any increased costs which may have been incurred were heavy rains and failure of the contractor to make a reasonable prebid investigation of the site or examination of specifications, and no evidence of fault on the part of the Government is presented, the Board holds that the contractor has not sustained its burden of proof for entitlement to an equitable adjustment, and the appeal will be denied.

Appeal of M & P Equipment Co., IBCA-1088-11-75 (Sept. 28, 1979) 86 I.D. 527

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Damages

Liquidated Damages

Where the evidence shows no meeting of the minds between a completing surety and the Government on the matter of the surety's liability for liquidated damages, the Government does not waive the right to assess liquidated damages under a novation theory merely by allowing the surety, otherwise liable for liquidated damages under the contract, to complete performance of the contract terminated for default.

Appeal of General Construction Corp. of America by Financial Indemnity Co. (Its Surety), IBCA-1178-2-78 (Mar. 29, 1979) 86 I.D. 206

Measurement

Where imponderables make it difficult to arrive at an accurate measurement of the amount of concrete placed under water, the Board finds that the amount represented by "paid for" concrete minus the amount of concrete admittedly wasted is the preferred method for determining the amount to which the contractor is entitled for the concrete so placed.

Appeal of William P. Bergan, Inc., IBCA-1130-11-76 (Feb. 2, 1979) 86 I.D. 65

Equitable Adjustments

Where imponderables make it difficult to arrive at an accurate measurement of the amount of concrete placed under water, the Board finds that the amount represented by "paid for" concrete minus the amount of concrete admittedly wasted is the preferred method for determining the amount to which the contractor is entitled for the concrete so placed.

Where the evidence clearly establishes that the Government specifications were defective in a number of respects but fails to show that many of the costs claimed are attributable to actions of the Government, the Board--noting that it is impossible to determine the amount to which the contractor is entitled with mathematical exactness--finds that the "jury verdict" method of determining the amount of the equitable adjustment is the most appropriate method in the circumstances presented by the instant appeal.

Appeal of William P. Bergan, Inc., IBCA-1130-11-76 (Feb. 2, 1979) 86 I.D. 65

When arguments advanced in a motion for reconsideration convince the Board that the formula used in determining an equitable adjustment was not the most accurate method but where neither party submits a better method, the Board will vacate its original finding regarding the equitable adjustment and make a recomputation based on the evidence of record.

Appeal of J. A. LaPorte, Inc., IBCA-1146-3-77 (Feb. 14, 1979) 86 I.D. 125

Where there is evidence that some of the additional expenses claimed were due to contractor's own negligence and inefficiency, such factors must be considered in determining the amount of the equitable adjustment.

Appeal of RHC Construction, Inc., IBCA-1207-9-78 (June 26, 1979)

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

Where the evidence supports entitlement of a contractor to an equitable adjustment resulting from a constructive change, but fails to establish that all the claimed extra costs were incurred as a direct result of the constructive change, the Board will employ the jury verdict approach in order to determine the appropriate amount to be awarded to the contractor.

Appeal of Environment Consultants, Inc., IBCA-1192-5-78 (June 29, 1979) 86 I.D. 349

Where the preponderance of the evidence shows that substantial increased costs were incurred by a highway construction contractor, primarily because Government inspection personnel either failed to calibrate or improperly calibrated the density testing machine used to determine compaction compliance, and it is determined that the contractor is entitled to an equitable adjustment, the Board will adopt the amount for quantum reached by the parties at a negotiated settlement, when dissatisfied with both the Government audit and the quantum computation of the contractor, but satisfied that the negotiations were made in good faith, at arm's length, and by individuals thoroughly familiar with the details of the contract and its performance.

Appeal of Nielsons, Inc., IBCA-1173-11-77 (Sept. 27, 1979) 86 I.D. 493

Where a clearing contractor claims entitlement to an equitable adjustment based on the standard Differing Site Conditions clause of the contract, and the evidence shows that the principal causes of any increased costs which may have been incurred were heavy rains and failure of the contractor to make a reasonable prebid investigation of the site or examination of specifications, and no evidence of fault on the part of the Government is presented, the Board holds that the contractor has not sustained its burden of proof for entitlement to an equitable adjustment, and the appeal will be denied.

Appeal of M & P Equipment Co., IBCA-1088-11-75 (Sept. 28, 1979) 86 I.D. 527

Jurisdiction

A claim by a concessioner under a National Park Service Contract is dismissed as beyond the purview of the Board's jurisdiction where the contract contains no disputes clause and by its express terms the Contract Disputes Act of 1978 is not applicable to the claim asserted.

Appeal of Yosemite Park and Curry Co., IBCA-1232-12-78 (Mar. 16, 1979) 86 I.D. 197

The award of a contract to a statntorily debarred bidder was properly canceled upon discovery of the debarred status and there being no valid contract between the parties, the Board is without jurisdiction to consider an appeal.

Appeal of City Window Cleaners, IBCA-1218-10-78 (June 12, 1979) 86 I.D. 329

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Jurisdiction--Continued

A contractor may not proceed under the provisions of the Contract Disputes Act of 1978 where the appeal is from a final decision of the contracting officer rendered and received by the appellant prior to the effective date of the Act.

Appeals of Gregory Lumber Co., Inc., IBCA-1237-12-78, 1238-12-78, 1239-12-78, 1240-12-78 (Sept. 28, 1979) 86 I.D. 520

Termination for Default

Generally

Where the evidence shows no meeting of the minds between a completing surety and the Government on the matter of the surety's liability for liquidated damages, the Government does not waive the right to assess liquidated damages under a novation theory merely by allowing the surety, otherwise liable for liquidated damages under the contract, to complete performance of the contract terminated for default.

Appeal of General Construction Corp. of America by Financial Indemnity Co. (Its Surety), IBCA-1178-2-78 (Mar. 29, 1979) 86 I.D. 206

When a contractor failed to furnish the number of laborers required under a service contract and failed to cure such deficiency after a notice to show cause why the contract should not be terminated for default, the Board held that termination for default was proper and further held that the Government should continue to withhold earnings under the contract to satisfy first the wage claims by unpaid employees of the contractor as determined by the Department of Labor pursuant to the Service Contract Act of 1965 and secondly to satisfy any claim for excess costs by the contracting agency.

Appeal of Andy's Excavating, IBCA-1236-12-78 (Sept. 19, 1979) 86 I.D. 469

When the Government could not require delivery of a refrigerated storage unit within the original delivery schedule because the building in which the unit was to be installed was not finished and the Government thereafter continned to negotiate changes in specifications and delivery dates with the contractor, the Board held that the Government had waived the original delivery schedule and that the Government did not regain the right to terminate the contract for default since there was no mutual agreement on a new delivery date and the Government's unilateral attempt to reestablish a specific contractnal delivery date was unreasonable as not being within the performance capabilities of the contractor at the time the notice was given.

Appeal of Kenney Refrigeration, IBCA-1230-12-78 (Sept. 28, 1979) 86 I.D. 503

FORMATICN AND VALIDITY

Authority to Make

Where an award is made to a firm while one of the partners is nnder debarment for violation of a labor

CONTRACTS--Continued

FORMATION AND VALIDITY--Continued

Authority to Make--Continued

statute due to administrative oversight, the contracting officer is without authority to make a valid award, and the purported contract is void ab initio.

Appeal of City Window Cleaners, IBCA-1218-10-78 (June 12, 1979) 86 I.D. 329

Bid Award

Where the contractor's bid is accepted during an extension of the bid acceptance period conditioned upon the contractor not being prejudiced by changes resulting from energy related shortages, the Board finds that the contractor's conditional acceptance of a change order increasing prices for asphaltic materials to a certain date continued the bid qualification in effect and does not preclude recovery of asphaltic price increases thereafter.

Nielsons, Inc., IBCA-1126-9-76 (Mar. 8, 1979) 86 I.D. 182

Legality

Where an award is made to a firm while one of the partners is under debarment for violation of a labor statute due to administrative oversight, the contracting officer is without authority to make a valid award, and the purported contract is void ab initio.

Appeal of City Window Cleaners, IBCA-1218-10-78 (June 12, 1979) 86 I.D. 329

PERFORMANCE OR DEFAULT

Acceptance of Performance

When the contractor offers materials which the contracting officer discovers are not in total compliance with the specifications, the contracting officer may accept the material if he finds it to be in the best interests of the Government. That acceptance, however, is not final and conclusive if based on, or induced by, a misrepresentation of a material fact.

Where the Government does not issue a written change order and does not give a verbal order which is interpreted by the contractor as a change, no contract change has occurred and the contractor may submit materials conforming to the original specifications. The Government's mere exercise of its option to accept nonconforming goods does not in and of itself constitute a contract change.

Appeal of Nasatka & Sons, Inc., IBCA-1157-6-77 (Sept. 28, 1979) 86 I.D. 513

Excusable Delays

The Government's use of records of the preceding 10 years of seasonal rainfall was proper in determining the days of delay which should have been anticipated by the contractor during the winter months in question.

A contractor, who encounters unusually severe weather as it pertains to one phase of contract work but works on other phases of work within that same period, is not entitled to a contract time extension, since the contract work on the whole was not delayed.

Holidays falling within a contract period should have been anticipated by the contractor as nonworking days

CONTRACTS--Continued

PERFORMANCE OR DEFAULT--Continued

Excusable Delays--Continued

and thus cannot be adjudged as unforeseeable days of delay.

Appeal of Wunschel & Small, Inc., IBCA-1263-5-79 (Sept. 28, 1979)

Inspection

When the contractor offers materials which the contracting officer discovers are not in total compliance with the specifications, the contracting officer may accept the material if he finds it to be in the best interests of the Government. That acceptance, however, is not final and conclusive if based on, or induced by, a misrepresentation of a material fact.

Appeal of Nasatka & Sons, Inc., IBCA-1157-6-77 (Sept. 28, 1979) 86 I.D. 513

Release and Settlement

Where a contractor voluntarily signs directives specifying the payments to be made for the additional work ordered without taking any exception thereto, the unqualified acceptance of the directives involved is found to be binding upon the contractor to the extent of the direct costs entailed in performance of the additional work.

Appeal of William P. Bergan, Inc., IBCA-1130-11-76 (Feb. 2, 1979) 86 I.D. 65

Where the Government has accepted a bid conditioned upon the contractor not being prejudiced by changes resulting from energy related shortages and the parties agree in a change order to an increase in price for asphaltic materials, the Board finds the agreement does not constitute an accord and satisfaction precluding further price increases where the evidence shows there was no meeting of the minds and this was evident to the contracting officer prior to execution of the change order.

Nielsons, Inc., IBCA-1126-9-76 (Mar. 8, 1979) 86 I.D. 182

DELEGATION OF AUTHORITY

GENERALLY

Where the Secretary has declined to exercise his jurisdiction, a decision rendered by this Board is final for the Department. Hence, statements by BLM and arguments of the Solicitor, while valuable to the Board, are not binding upon the Board.

H. R. Delasco, Inc., et al., 39 IBLA 194 (Feb. 2, 1979)

A decision by the Bureau of Land Management canceling fee simple patents issued to Indians and simultaneously issuing new Indian trust patents is not subject to review by the Board of Land Appeals, which has no jurisdiction in the matter, where the decision was made at the direction of the Assistant Secretary for Indian Affairs.

Blue Star, Inc., Atomic Western, Inc., Fremont Energy Corp., Ivor Adair, 41 IBLA 333 (July 11, 1979)

DESERT LAND ENTRY

APPLICATIONS

Where the Secretary by appropriate notice in the Federal Register has classified certain lands for multiple use management and such lands are segregated from desert land entry, and the classification has not been terminated by either a reclassification or publication in Federal Register of termination of classification, BLM properly denied petition-application for desert land entry.

Paul M. Jenkins, 39 IBLA 141 (Jan. 29, 1979)

Melvin V. Frandsen, Mary C. Frandsen, 43 IBLA 130 (Sept. 26, 1979)

CLASSIFICATION

Where the Secretary by appropriate notice in the Federal Register has classified certain lands for multiple use management and such lands are segregated from desert land entry, and the classification has not been terminated by either a reclassification or publication in Federal Register of termination of classification, BLM properly denied petition-application for desert land entry.

Paul M. Jenkins, 39 IBLA 141 (Jan. 29, 1979)

Melvin V. Frandsen, Mary C. Frandsen, 43 IBLA 130 (Sept. 26, 1979)

LANDS SUBJECT TO

Where the Secretary by appropriate notice in the Federal Register has classified certain lands for multiple use management and such lands are segregated from desert land entry, and the classification has not been terminated by either a reclassification or publication in Federal Register of termination of classification, BLM properly denied petition-application for desert land entry.

Paul M. Jenkins, 39 IBLA 141 (Jan. 29, 1979)

Melvin V. Frandsen, Mary C. Frandsen, 43 IBLA 130 (Sept. 26, 1979)

ENVIRONMENTAL POLICY ACT

To secure the exemption under sec. 404(r) of the Federal Water Pollution Control Act for projects described in an environmental statement, compliance with seven specific conditions is required. The exemption does not apply to the maintenance of existing Federal projects, but only to new construction. While the exemption provides an alternative procedure to achieve compliance with sec. 404 of the Act for a limited category of Federal projects under very specific conditions, it does not lessen the substantive requirements that apply to the discharge of dredged or fill material.

Permit Requirements for Discharge of Dredged or Fill Material Under Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. § 1344, M-36915 (Aug. 27, 1979) 86 I.D. 400

ENVIRONMENTAL QUALITY

GENERALLY

The Secretary of the Interior is obligated to support and implement the national policy expressed by Congress in the National Environmental Policy Act of 1969.

Southern California Motorcycle Club, Inc., Sierra Club, 42 IBLA 164 (Aug. 17, 1979)

ENVIRONMENTAL STATEMENTS

To secure the exemption under sec. 404(r) of the Federal Water Pollution Control Act for projects described in an environmental statement, compliance with seven specific conditions is required. The exemption does not apply to the maintenance of existing Federal projects, but only to new construction. While the exemption provides an alternative procedure to achieve compliance with sec. 404 of the Act for a limited category of Federal projects under very specific conditions, it does not lessen the substantive requirements that apply to the discharge of dredged or fill material.

Permit Requirements for Discharge of Dredged or Fill Material Under Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. § 1344, M-36915 (Aug. 27, 1979) 86 I.D. 400

EQUITABLE ADJUDICATION

GENERALLY

Equitable adjudication of an application to purchase a headquarters site claim filed at least 8 years after the land has been withdrawn must be denied as substantial compliance with the law has not been made where neither occupancy of the site prior to the withdrawal nor after the withdrawal could validly be considered under the law.

Rene P. Lamoureux d/b/a Frenchy Lamoureux, 39 IBLA 36 (Jan. 15, 1979)

Equitable estoppel against the Government will not lie where there has been no affirmative misconduct by an authorized agent or officer resulting in a misrepresentation of fact upon which a party was led to rely to his ultimate detriment.

Dorothy Smith, 39 IBLA 306 (Feb. 23, 1979)

The Government is not estopped from rejecting oil and gas lease offers because the offerors' leasing agent alleges that he relied on a representation by officers of BLM that his disclaimer of his interest in the offer was valid and therefore failed to amend his service agreement with his clients to remove the interest-creating provision, where it appears that BLM did not in fact so represent.

Frederick W. Lowey et al., 40 IBLA 381 (May 14, 1979)

The Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976), repealed the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970), with the exception of applications pending on Dec. 18, 1971. A State Office decision rejecting a Native allotment application for an additional parcel of land filed pursuant to the Act of May 17, 1906, after Dec. 18, 1971, will be affirmed. Equitable adjudication, which requires substantial compliance with the law, will not

EQUITABLE ADJUDICATION--Continued

GENERALLY--Continued

be invoked where there is no evidence that such an application was timely filed with BIA.

Nora L. Sanford, 43 IBLA 74 (Sept. 19, 1979)

SUBSTANTIAL COMPLIANCE

Equitable adjudication of an application to purchase a headquarters site claim filed at least 8 years after the land has been withdrawn must be denied as substantial compliance with the law has not been made where neither occupancy of the site prior to the withdrawal nor after the withdrawal could validly be considered under the law.

Rene P. Lamoureux d/b/a Frenchy Lamoureux, 39 IBLA 36 (Jan. 15, 1979)

ESTOPPEL

Reliance on erroneous information provided by Federal employees cannot create any rights not authorized by law.

W. B. and Margaret W. Collier, 39 IBLA 81 (Jan. 24, 1979)

Estoppel to preclude a charge of trespass is not invoked against BLM where BLM's partially completed fences on Federal land do not restrain cattle and there is no evidence that BLM agreed to construct and/or maintain said fences for the benefit of the grazier, and such grazier was at all times aware of these facts.

The grazing regulations (43 CFR 4140.1(b)(1), inter alia) (formerly 43 CFR 4112.3-1(a) and (b)) place the responsibility of controlling cattle squarely on the grazier, and Government range management policies as implemented under acts of Congress cannot be asserted to bar sanctions where trespasses have been proved, or to estop BLM from alleging trespasses.

Bureau of Land Management vi Holland Livestock Ranch et al., 39 IBLA 272 (Feb. 15, 1979) 86 I.D. 133

Equitable estoppel against the Government will not lie where there has been no affirmative misconduct by an authorized agent or officer resulting in a misrepresentation of fact upon which a party was led to rely to his ultimate detriment.

Dorothy Smith, 39 IBLA 306 (Feb. 23, 1979)

BLM is not estopped to readjust a coal lease issued pursuant to the terms of sec. 7, Mineral Leasing Act, 30 U.S.C. § 207 (1970), by its failure to readjust said lease prior to or immediately after expiration of its 20-year period.

California Portland Cement Co., Rosebud Coal Sales Co., 40 IBLA 339 (May 10, 1979)

ESTOPPEL--Continued

The Government is not estopped from rejecting oil and gas lease offers because the offerors' leasing agent alleges that he relied on a representation by officers of BLM that his disclaimer of his interest in the offer was valid and therefore failed to amend his service agreement with his clients to remove the interest-creating provision, where it appears that BLM did not in fact so represent.

Frederick W. Lowey et al., 40 IBLA 381 (May 14, 1979)

Reliance on incomplete information supplied by Bureau of Land Management employees cannot estop the United States or excuse compliance with a regulation.

Fred S. Ghelarducci, 41 IBLA 277 (June 28, 1979)

The elements of an estoppel are the following: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Estoppel is available as a defense against the Government if the Government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel.

Estoppel of the Government is an extraordinary remedy, expecially as it relates to public lands, and is to be applied with the greatest care and circumspection.

Edward L. Ellis and Steve R. Ellis, 42 IBLA 66 (Aug. 8, 1979)

Reliance upon erroneous advice or incomplete information provided by BLM employees cannot relieve the owner of a mining claim of an obligation imposed on him by statute or relieve him of the consequences imposed by a statute for his failure to comply with its requirements.

Clair R. Caldwell et al., 42 IBLA 139 (Aug. 16, 1979)

A delay in adjudication of an application by the Department cannot create rights contrary to law.

New England Fish Co., 42 IBLA 200 (Aug. 22, 1979)

EVIDENCE

GENERALLY

Where an oil and gas lease offeror fails to respond within a prescribed period of time to an order to submit specific information necessary to determine whether his offer is valid, it is appropriate to reject the offer.

Where a protestant against the issuance of an oil and gas lease supports his allegations that the lease offer is not qualified with sufficient evidence to warrant further inquiry or investigation by BLM, the protest should not be summarily dismissed for failure of the protestant to make positive proof of his allegations. Instead, the protest should be adjudicated on its merits after all available information has been developed.

Lee S. Bielski, 39 IBLA 211 (Feb. 8, 1979) 86 I.D. 80

EVIDENCE--Continued

GENERALLY--Continued

Where the evidence as to specific trespass indicates that of a number of cattle counted some were located on private intermingled land, but there were no barriers, either natural or artificial, which would have prevented the cattle on private land from going onto the public land, it is proper to find that all cattle counted would tend to consume forage at a rate proportional to the ratio of forage available on private and public lands.

Bureau of Land Management v. Holland Livestock Ranch et al., 39 IBLA 272 (Feb. 15, 1979) 86 I.D. 133

Where a Native allotment application is filed before the death of an applicant, proof of the applicant's use and occupancy, if otherwise timely, may be filed by the appropriate official of the Bureau of Indian Affairs pursuant to 43 CFR 2561.2(a) after the applicant's death. A decision rejecting the application because the proof was filed after the applicant's death must be set aside where the proof is not inconsistent with the application. Further proceedings must be served upon the heirs, known or unknown, by appropriate service, and also upon conflicting claimants, such as the State of Alaska.

Ernest L. Olson, Jr. (Deceased), 41 IBLA 179 (June 22, 1979)

Where legal conclusions are reached in an appellate decision upon undisputed facts, and there has been no proffer of further facts which could compel different legal conclusions, no useful purpose would be served for a hearing, and a request therefor is properly denied.

Floyd L. Anderson, Sr., 41 IBLA 280 (June 28, 1979) 86 I.D. 345

Peter Panruk, 43 IBLA 69 (Sept. 19, 1979)

Where a protestant against the issuance of leases, for oil and gas presents evidence demonstrating the existence of a written partnership between joint offers, and the offerors have not complied with the regulations requiring certain showings of partnerships, the offers cannot be honored.

American Quasar Petroleum Co., 42 IBLA 243 (Aug. 22, 1979)

In a mining claim contest where a contestee is of the opinion that the Government did not make a prima facie case of no discovery, he may move to have the case dismissed at the conclusion of the Government's case and then rest. The contest complaint could be dismissed if the administrative law judge rules that no prima facie case had been made of lack of discovery and there is no other evidence in the record to support the charges in the complaint. But if the contestee goes forward after making such a motion to dismiss and presents his evidence, that evidence must be considered as part of the entire record and its probative value will be weighed. Thus, even if the Government has failed to make a prima facie case, evidence presented by the contestee which supports the Government's contest charges may be used against the contestee, regardless of the defects in the Government's case.

United States v. Andy Syndbad, 42 IBLA 313 (Aug. 29, 1979)

EVIDENCE--Continued

ADMISSIBILITY

It was proper to deny mining claimants' request to redrill on mining claims after the land was withdrawn from mining where the work would be an effort to make a discovery of a valuable mineral deposit within the claim rather than simply a confirmation or corroboration of a discovery prior to the withdrawal.

United States v. William Lavon Chappell et al., 42 IBLA 74 (Aug. 13, 1979)

BURDEN OF PROOF

A district manager's decision reached in the exercise of administrative discretion pursuant to the Taylor Grazing Act of 1934 may be regarded as arbitrary or capricious only where it is not supportable on any rational basis and the burden is on the appellant to show by substantial evidence that the decision is improper. A district manager's decision not to reissue a grazing lease for a certain area until that area is fenced and to reduce appellant's AUM's accordingly rests on a rational basis where the facts show that this unfenced area adjoins the bombing range and grazing thereon could result in trespass on the bombing range, inconsistent with the use of the range.

Colvin Cattle Co., Inc., 39 IBLA 176 (Jan. 30, 1979)

After holding a hearing pursuant to the Administrative Procedure Act, an administrative law judge may properly find that a person has committed a grazing trespass if that finding is in accordance with and supported by reliable, probative and substantial evidence.

Bureau of Land Management v. Holland Livestock Ranch et al., 39 IBLA 272 (Feb. 15, 1979) 86 I.D. 133

When the Government contests a mining claim on a charge of lack of discovery, the Government has the burden of proving a prima facie case; the burden then shifts to the mining claimant to prove by a preponderance of the evidence that discovery exists.

United States v. Ted G. Ax, 43 IBLA 146 (Sept. 28, 1979)

PRIMA FACIE CASE

Pursuant to the provision of 63 Oklahoma Statute 1-324, a birth certificate is prima facie evidence of the facts therein stated and unless rebutted is sufficient in and of itself.

Estate of Roland Loyd (Mobeadlemah) Botone, 7 IBIA 177 (Aug. 16, 1979)

SUFFICIENCY

After holding a hearing pursuant to the Administrative Procedure Act, an administrative law judge may properly find that a person has committed a grazing trespass if that finding is in accordance with and supported by reliable, probative and substantial evidence.

Bureau of Land Management v. Holland Livestock Ranch et al., 39 IBLA 272 (Feb. 15, 1979) 86 I.D. 133

EVIDENCE--Continued

SUFFICIENCY--Continued

When on appeal a sufficient showing is made to call into question a determination that land lies within a known geologic structure of a producing oil or gas field, and a hearing is requested, the decision may be set aside and remanded for hearing.

Jack J. Bender, 40 IBLA 26 (Mar. 9, 1979)

Where, on appeal, a mining claimant alleges that he timely mailed the affidavits of assessment work to the proper BLM office but there is no evidence to indicate they were ever received, the claimant must bear the consequence's of the loss and his inability to prove his allegation that they may have been received by the Bureau and subsequently lost.

Amanda Mining & Manufacturing Ass'n., 42 IBLA 144 (Aug. 16, 1979)

Roger Kuhn, 43 IBLA 182 (Sept. 28, 1979)

EXCHANGES OF LAND

GENERALLY

The Act of Mar. 20, 1922, authorized exchanges for the purpose of consolidating national forest lands, if two criteria were satisfied: (1) the public interest would be benefited thereby; and (2) the proffered lands were chiefly valuable for national forest purposes.

Petro Leasco, Inc., 42 IBLA 345 (Aug. 31, 1979)

Where private land exchange was for surface rights only and applicant's warranty deed mistakenly conveys a fee simple absolute, the facts concerning which are well-documented, on equitable principles an applicant may be entitled to issuance of a disclaimer of interest in the mineral estate. 43 U.S.C. § 1745 (1976).

Dennis Potts, 42 IBLA 355 (Sept. 11, 1979)

FOREST EXCHANGES

The Act of Mar. 20, 1922, authorized exchanges for the purpose of consolidating national forest lands, if two criteria were satisfied: (1) the public interest would be benefited thereby; and (2) the proffered lands were chiefly valuable for national forest purposes.

Petro Leasco, Inc., 42 IBLA 345 (Aug. 31, 1979)

FEDERAL EMPLOYEES AND OFFICERS

AUTHORITY TO BIND GOVERNMENT

Reliance upon erroneous or incomplete information provided by employees of the Bureau of Land Management cannot create any rights not authorized by law.

Juan Munoz, 39 IBLA 72 (Jan. 24, 1979)

J. A. Masek, 40 IBLA 123 (Mar. 27, 1979)

John C. Schandelmeier, 42 IBLA 240 (Aug. 22, 1979)

Tilden Holloway, Roland Wright, 43 IBLA 134 (Sept. 28, 1979)

FEDERAL EMPLOYEES AND OFFICERS--Continued

AUTHORITY TO BIND GOVERNMENT--Continued

Reliance on erroneous information provided by Federal employees cannot create any rights not authorized by law.

W. R. and Margaret W. Collier, 39 IBLA 81 (Jan. 24, 1979)

Southern California Motorcycle Club, Inc., Sierra Club, 42 IBLA 164 (Aug. 17, 1979)

Erroneous issuance by BLM of oil and gas lease on other withdrawn land in area of tract for which appellant submitted lease offer does not effect restoration to leasing of latter withdrawn tract.

F. M. Tully, 39 IBLA 137 (Jan. 29, 1979)

Reliance upon erroneous notations to a BLM serial register page or incomplete information provided by BLM employees cannot create any rights not authorized by law.

Alver C. Duncan, 39 IBLA 144 (Jan. 29, 1979)

Estoppel to preclude a charge of trespass is not invoked against BLM where BLM's partially completed fences on Federal land do not restrain cattle and there is no evidence that BLM agreed to construct and/or maintain said fences for the benefit of the grazier, and such grazier was at all times aware of these facts.

The grazing regulations (43 CFR 4140.1(b)(1), inter alia) (formerly 43 CFR 4112.3-1(a) and (b)) place the responsibility of controlling cattle squarely on the grazier, and Government range management policies as implemented under acts of Congress cannot be asserted to bar sanctions where trespasses have been proved, or to estop BLM from alleging trespasses.

Bureau of Land Management v. Holland Livestock Ranch et al., 39 IBLA 272 (Feb. 15, 1979) 86 I.D. 133

The authority of the United States to enforce a public right or protect a public interest, including its right to cancel invalid mining claims which encumber the public lands, is not vitiated or lost by acquiescence of its officers or agents, or by their laches or delays in the performance of their duties. Regardless of this rule, laches is not appropriate where it appears that the Government's failure to act probably resulted from unfamiliarity with existence of these mining claims.

Equitable estoppel against the Government will not lie where there has been no affirmative misconduct by an authorized agent or officer resulting in a misrepresentation of fact upon which a party was led to rely to his ultimate detriment.

Dorothy Smith, 39 IBLA 306 (Feb. 23, 1979)

The Government is not estopped from rejecting oil and gas lease offers because the offerors' leasing agent alleges that he relied on a representation by officers of BLM that his disclaimer of his interest in the offer was valid and therefore failed to amend his service agreement with his clients to remove the interest-creating provision, where it appears that BLM did not in fact so represent.

Frederick W. Lowey et al., 40 IBLA 381 (May 14, 1979)

FEDERAL EMPLOYEES AND OFFICERS--Continued

AUTHORITY TO BIND GOVERNMENT--Continued

Reliance on incomplete information supplied by Bureau of Land Management employees cannot estop the United States or excuse compliance with a regulation.

Fred S. Ghelarducci, 41 IBLA 277 (June 28, 1979)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

GENERALLY

Under sec. 314(b) of the Federal Land Policy and Management Act of Oct. 21, 1976, 43 U.S.C. § 1744(b) (1976), and 43 CFR 3833.1-2, the owner of an unpatented lode or placer mining claim located after Oct. 21, 1976, shall, within 90 days after the date of location of such claim, file in the proper BLM office a copy of the official record of the notice of location or certificate of location. Failure to file such instruments shall be deemed conclusively to constitute an abandonment of the mining claim by the owner.

Roy M. Byram, 39 IBLA 32 (Jan. 15, 1979)

Phillip M. Gardiner et al., 41 IBLA 391 (July 24, 1979)

Under sec. 314(a) of the Federal Land Policy and Management Act of 1976, the owner of an unpatented mining claim must file a notice of intention to hold his claim prior to Dec. 31 of the calendar year following the date of location of such claim, or the claim shall be deemed conclusively to have been abandoned.

Juan Munoz, 39 IBLA 72 (Jan. 24, 1979)

The Federal Land Policy and Management Act of 1976, 43 U.S.C.A. § 1702(h) (West Supp. 1978), providing for sustained yield management of timber resources, and 16 U.S.C. §§ 594, 594-1 (1970), which direct a policy of preserving forest resources from insect infestation and damage, envisage that the Department is under an obligation to protect timber from such ravages, including without limitation, the sale of timber so affected.

George Jalbert et al., 39 IBLA 205 (Feb. 2, 1979)

Under sec. 314(b) of the Federal Land Policy and Management Act of Oct. 21, 1976, 43 U.S.C. § 1744(b) (1976), and 43 CFR 3822.1-2, the owner of a mining claim located after Oct. 21, 1976, must file a notice of recordation of the claim with the proper Bureau of Land Management office within 90 days of location of the claim, or the claim is deemed abandoned and void.

Dale C. DeLor, 40 IBLA 88 (Mar. 22, 1979)

Jim Spicer, 42 IBLA 288 (Aug. 27, 1979)

R.S. 2387, 2388 and 2389, 43 U.S.C. §§ 718-720 (1976), were repealed by sec. 703 of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2790, and any transfer of land for a townsite within a National Forest after the effective date of FLPMA, Oct. 21, 1976, must be made under authority of sec. 213 of that Act. The filing of an application under other statutes prior to the enactment of FLPMA does nor constitute a valid existing right which would survive FLPMA.

Townsite of Liberty, 40 IBLA 317 (Apr. 30, 1979)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

GENERALIY--Continued

The Federal Land Policy and Management Act, 43 U.S.C. § 1701 et seq. (1976), does not establish any reserved rights in BLM lands.

The management programs mandated by Congress in such Acts as the Taylor Grazing Act and FLPMA require the appropriation of water by the United States in order to assure the success of the programs and carry out the objectives established by Congress.

Sec. 701(g) of FLPMA, 43 U.S.C. § 1701 notes (1976), maintains the status quo in the relationship between the States and the Federal Government on water, and allows for (a) the continued appropriation of unappropriated nonnavigable waters on the public domain by private persons pursuant to State law as authorized by the Desert Land Act; (b) the right of the United States to use unappropriated water for the congressionally recognized and mandated purposes set forth in legislation providing for the management of the public domain; and (c) application by the United States to secure water rights pursuant to State law for these purposes.

FLPMA, the Taylor Grazing Act, the O&C Act, and other statutes permit the United States to appropriate water for the diverse purposes found in the various statutes.

FLPMA authorizes the BLM to appropriate water for such uses as fish and wildlife maintenance and protection, scenic value preservation, and human consumption, and protection of areas of critical environmental concern.

Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914 (June 25, 1979)
86 I.D. 553

"Public Lands." Land within an interim conveyance to a Native Corporation is no longer "public land" under the Federal Land Policy and Management Act nor subject to Bureau of Land Management jurisdiction to issue rights-of-way under that Act.

New England Fish Co., 42 IBLA 200 (Aug. 22, 1979)

Sec. 314 of the Federal Land Policy and Management Act of 1976 was enacted to establish a Federal recording system for mining claims to facilitate Federal land use planning and management. Failure to comply with the mandatory filing requirements constitutes abandonment of the claim and the land reverts to the status of public domain.

In the absence of a specific regulation or policy directive specifying the type of proof necessary for recordation, the Bureau of Land Management should liberally consider attempts by a mining claimant under sec. 314 of the Federal Land and Policy Management Act to record notice of a mining claim where proof of recording cannot be made and 30 U.S.C. § 38 (1976) is relied upon for holding the claim, and before rejecting a filing for such a claim, BLM should request further evidence from the claimant which it would consider satisfactory. Such evidence should include at a minimum the name the claim is and has been known by, the name and address of the claimant, an adequate description of the claim, the type of claim, the time of holding and working the claim to meet a State's statute of limitations and, if possible, the date of the origin of claimant's title and facts as to continuation of possession of the claim, and any other information available showing a chain of title to the claimant and bearing upon the possession and occupancy of the claim for mining purposes, and other information which the Bureau of Land Management

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

GENERALLY--Continued

deems essential to meet the purposes of the recordation provision.

Philip Sayer, 42 IBLA 296 (Aug. 27, 1979)

The regulation, 43 CFR 3833.2-1(b)(1), requiring evidence of assessment work to be filed prior to Dec. 31 of the year following location of the claim, is mandatory. Failure to comply therewith must result in a finding that the claim has been abandoned.

Donald L. Fulgham, 42 IBLA 338 (Aug. 30, 1979)

The Federal Land Policy and Management Act of 1976 requires, among other things, (1) a determination by the Secretary of Agriculture that the public interest will be well served by a proposed national forest exchange; (2) that evaluation of the public interest shall fully consider the panoply of Federal, State, and local needs enumerated; and (3) that the Secretary shall find that the values and objectives to be served by Federal lands, if retained, do not exceed the values of, and public objectives serviceable by, the proffered lands if acquired.

Petro Lease, Inc., 42 IBLA 345 (Aug. 31, 1979)

Pursuant to 43 U.S.C. § 1712(e)(3) (1976), a wholly owned Government corporation may acquire and hold rights as a citizen under the Mining Law of 1872.

John R. Meadows, 43 IBLA 35 (Sept. 12, 1979)

Departmental regulations 43 CFR Subpart 3109 and 43 CFR 3120.2-3, and sec. 603 of the Federal Land Policy and Management Act of 1976 provide ample authority for the Bureau of Land Management to require oil and gas lessees to agree to wilderness protection stipulations.

Palmer Oil and Gas Co., 43 IBLA 115 (Sept. 24, 1979)

The regulations governing recordation of mining claims are mandatory, and failure to comply therewith must result in a finding that the claim has been abandoned. Where appellants timely file for record an "amended" location notice, accompanied by the original location notice which is untimely on its face, the mining claim is properly deemed abandoned as to the original location, but not as to the "amended" claim if it is a relocation of the claim under the law.

Walter T. Paul, James H. Meyer, 43 IBLA 119 (Sept. 24, 1979)

ASSESSMENT WORK

Under the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a)(2) (1976), if an unpatented mining claim located after Oct. 21, 1976, is not supported annually by either an affidavit of assessment work or notice of intention to hold, the claim will be conclusively deemed abandoned and void, despite appellant's statement there was no intent to abandon and that failure to file was an oversight.

Nuclear Power and Energy Co. and B-2, Inc., 41 IBLA 142 (June 14, 1979)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

ASSESSMENT WORK--Continued

Where the owner of an unpatented mining claim located prior to Oct. 21, 1976, fails to file an affidavit of assessment work or notice of intention to hold the claim on or before Dec. 31 of the calendar year following the calendar year in which he recorded the claim in the BLM office, his claim is properly deemed conclusively to have been abandoned.

Charles and Pete Caress, 41 IBLA 302 (June 29, 1979)

Under the Federal Land Policy and Management Act of 1976, sec. 314, 43 U.S.C. § 1744 (1976), the owner of an unpatented mining claim located on Oct. 10, 1977, must file an affidavit of assessment work or a notice of intention to hold the mining claim prior to Dec. 31 of the following calendar year, 1978, or the claim will be conclusively deemed to have been abandoned.

Bruce Parke, 42 IBLA 18 (July 25, 1979)

Under the Federal Land Policy and Management Act of 1976, § 314, 43 U.S.C. § 1744 (1976), the owner of unpatented mining claims located in 1977 must file an affidavit of assessment work or a notice of intention to hold the claim prior to Dec. 31 of the following calendar year, 1978, or the claim will be conclusively deemed to have been abandoned. Where an appellant asserts on appeal that he timely mailed proof of labor to the Bureau of Land Management, but the documents were not received by that office, the documents cannot be considered as filed with that office unless and until they are received by it.

John Newkirk et al., 42 IBLA 292 (Aug. 27, 1979)

James E. Yates, 42 IBLA 391 (Sept. 11, 1979)

Where the owner of an unpatented mining claim located prior to Oct. 21, 1976, fails to file an affidavit of assessment work or notice of intention to hold the claim on or before Dec. 31 of the calendar year following the calendar year in which he recorded the claim in the BLM office, his claim is properly deemed conclusively to have been abandoned and to be null and void.

A State law which requires filing of proof of assessment work which requirement is more liberal than the recordation requirement of the Federal Land Policy and Management Act of 1976, § 314a, 43 U.S.C. § 1744 (1976), cannot override the more onerous requirements of the latter, since Article VI, Clause 2 of the Federal Constitution makes the Constitution, and laws and treaties made in conformity therewith, the supreme law of the land.

James V. Joyce, 42 IBLA 383 (Sept. 11, 1979)

Under the Federal Land Policy and Management Act of 1976, sec. 314, 43 U.S.C. § 1744 (1976), the owner of unpatented mining claims located in 1977 must file affidavits of assessment work or notices of intention to hold the claims prior to Dec. 31 of the following calendar year, 1978, or the claims will be conclusively deemed to have been abandoned, and may properly be declared void.

Ernest K. Lehmann and Associates, 43 IBLA 1 (Sept. 11, 1979)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

ASSESSMENT WORK--Continued

For the purposes of filing affidavits of assessment work or notices of intention to hold a mining claim, the date of location of the claim is the date as defined in 43 CFR 3833.0-5(h).

Under 43 U.S.C. § 1744(a) (1976), the owner of an unpatented mining claim located after Oct. 21, 1976, but in the calendar year 1976, must file an affidavit of assessment work or a notice of intention to hold the mining claim prior to Dec. 31 of the following calendar year, 1977, or the claim will be conclusively deemed to have been abandoned. Sec. 1744(a) does not conflict with 30 U.S.C. § 28 (1976) which pertains to the year in which tha first affidavit of assessment work must be recorded.

Charlie Carnal, Walter Peck, and Edward Borzansky, 43 IBLA 10 (Sept. 11, 1979)

DISCLAIMERS OF INTEREST

Where private land exchange was for surface rights only and applicant's warranty deed mistakenly conveys a fee simple absolute, the facts concerning which are well-documented, on equitable principles an applicant may be entitled to issuance of a disclaimer of interest in the mineral estate. 43 U.S.C. § 1745 (1976).

Dennis Potts, 42 IBLA 355 (Sept. 11, 1979)

EXCHANGES

The Federal Land Policy and Management Act of 1976 requires, among other things, (1) a determination by the Secretary of Agriculture that the public interest will be well served by a proposed national forest exchange; (2) that evaluation of the public interest shall fully consider the panoply of Federal, State, and local needs enumerated; and (3) that the Secretary shall find that the values and objectives to be served by Federal lands, if retained, do not exceed the values of, and public objectives serviceable by, the proffered lands if acquired.

Petro Leasco, Inc., 42 IBLA 345 (Aug. 31, 1979)

GRAZING LEASES AND PERMITS

Where two preference right applicants file conflicting applications for a grazing lease, sec. 402(c) of FLPMA, 43 U.S.C. § 1752(c) (1976), mandates issuance of the new lease to the holder of the expiring lease provided that the holder of the expiring lease maintains his or her preference right qualifications and is otherwise in conformance with the applicable rules and regulations.

Earl W. Platt, 43 IBLA 41 (Sept. 18, 1979) 86 I.D. 458

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM

Under the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a)(2) (1976), if an unpatented mining claim located after Oct. 21, 1976, is not supported annually by either an affidavit of assessment work or notice of intention to hold, the claim will be conclusively deemed abandoned and void, despite appellant's statement there was no intent to abandon and that failure to file was an oversight.

Nuclear Power and Energy Co. and B-2, Inc., 41 IBLA 142 (June 14, 1979)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

Reliance upon erroneous advice or incomplete information provided by BLM employees cannot relieve the owner of a mining claim of an obligation imposed on him by statute or relieve him of the consequences imposed by a statute for his failure to comply with its requirements.

Clair R. Caldwell et al., 42 IBLA 139 (Aug. 16, 1979)

Department of the Interior, as agency of executive branch of Government, is not proper forum to decide whether or not as to mining claims the recordation provisions of the Federal Land Policy and Management Act of 1976 are constitutional.

For the purposes of filing affidavits of assessment work or notices of intention to hold a mining claim, the date of location of the claim is the date as defined in 43 CFR 3833.0-5(h).

Charlie Carnal, Walter Peck, and Edward Borzansky, 43 IBLA 10 (Sept. 11, 1979)

RECORDATION OF MINING CLAIMS AND ABANDONMENT

Under sec. 314(b) of the Federal Land Policy and Management Act of Oct. 21, 1976, 43 U.S.C. § 1744(b) (1976), and 43 CFR 3833.1-2, the owner of an unpatented lode or placer mining claim located after Oct. 21, 1976, shall, within 90 days after the date of location of such claim, file in the proper BLM office a copy of the official record of the notice of location or certificate of location. Failure to file such instruments shall be deemed conclusively to constitute an abandonment of the mining claim by the owner.

Roy M. Byram, 39 IBLA 32 (Jan. 15, 1979)

Phillip M. Gardiner et al., 41 IBLA 391 (July 24, 1979)

The owner of an unpatented mining claim located after Oct. 21, 1976, on Federal land shall file within 90 days after the date of location of that claim in the proper BLM office a copy of the official record of the notice or certificate of location of the claim filed under State law. A copy of the notice or certificate shall be supplemented by, inter alia: (1) a map with a scale of not less than one-quarter inch to a mile showing the survey or protraction grids on which there will be depicted the location of the claim or site; and (2) a $5 service fee (nonreturnable) for each claim filed. Failure to file such instruments within tha proper time period shall be deemed conclusively to constitute an abandonment of the mining claim, and it shall be void.

Where a mining claim is located after the enactment of the Federal Land Policy and Management Act of 1976 (Oct. 21, 1976), but before the date of promulgation of regulations implementing the statutory requirements of the Act relative to the recordation of mining claims, a regulation having retroactive effects may nonetheless be sustained in spite of such retroactivity if it is reasonable.

Elbert O. Jensen, 39 IBLA 62 (Jan. 17, 1979)

Under sec. 314(a) of the Federal Land Policy and Management Act of 1976, the owner of an unpatented mining claim must file a notice of intention to hold his claim prior to Dec. 31 of the calendar year following the date of location of such claim, or the claim shall be deemed corclusively to have been abandoned.

Juan Munoz, 39 IBLA 72 (Jan. 24, 1979)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

Under sec. 314(b) of the Federal Land Policy and Management Act of Oct. 21, 1976, 43 U.S.C. § 1744(b) (1976), and 43 CFR 3822.1-2, the owner of a mining claim located after Oct. 21, 1976, must file a notice of recordation of the claim with the proper Bureau of Land Management office within 90 days of location of the claim, or the claim is deemed abandoned and void.

Dale C. DeLor, 40 IBLA 88 (Mar. 22, 1979)

Jim Spicer, 42 IBLA 288 (Aug. 27, 1979)

Under sec. 314(b) of the Federal Land Policy and Management Act of 1976, unless the required copy of the official record of location is filed in the proper BLM office within 90 days from the date of location, a mining claim located after Oct. 21, 1976, is void and any later filing of the notice is invalid.

Lawrence A. Landry, 40 IBLA 212 (Apr. 10, 1979)

Under sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), and 43 CFR 3833.1-2, the owner of a mining claim located after Oct. 21, 1976, must file a notice of recordation of the claim with the proper Bureau of Land Management office within 90 days of location of the claim. A notice must be received and date stamped in the BLM office within the 90-day period to be timely filed.

M. J. Reeves, 41 IBLA 92 (June 4, 1979)

Under 43 CFR 3833.2-1(b), the owner of unpatented mining claims located after Oct. 21, 1976, in the calendar year 1977, must file affidavits of assessment work or notices of intention to hold the mining claims prior to Dec. 31 of the following calendar year, 1978, or the claims will be conclusively deemed to have been abandoned under 43 CFR 3833.4(a).

Blackburn Enterprises, 41 IBLA 115 (June 11, 1979)

Under the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a)(2) (1976), if an unpatented mining claim located after Oct. 21, 1976, is not supported annually by either an affidavit of assessment work or notice of intention to hold, the claim will be conclusively deemed abandoned and void, despite appellant's statement there was no intent to abandon and that failure to file was an oversight.

Nuclear Power and Energy Co. and B-2, Inc., 41 IBLA 142 (June 14, 1979)

The owner of an unpatented mining claim relocated before Oct. 21, 1976, has until Oct. 21, 1979, in which to record his notice of location with BLM. However, if he elects to record in 1977, he must file an affidavit of assessment work or a notice of intention to hold the mining claim prior to Dec. 31 of the following year, 1978, and each year thereafter, or the claim will be conclusively deemed to have been abandoned.

William L. Rucinski, 42 IBLA 56 (Aug. 1, 1979)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

Where a person purchases a mining claim originally located on or before Oct. 21, 1976, the requirements of 43 CFR 3833.1-2(a) concerning claims located prior to the enactment of FLPMA apply, and the purchaser has until Oct. 21, 1979, to submit a copy of the official record of the notice of certificate of the claim filed under State law. In these circumstances, the 90-day filing deadline set out in 43 CFR 3833.1-2(b) for claims located after the enactment of FLPMA does not apply.

Warren D. Elmore, 42 IBLA 91 (Aug. 13, 1979)

Under 43 CFR 3833.2-1(a), the owner of unpatented mining claims located before Oct. 21, 1976, in the calendar year 1978, and recorded with the Bureau of Land Management (BLM) in 1977, must file affidavits of assessment work or notices of intention to hold the mining claims prior to Dec. 31 of each calendar year after recording, or the claims will be conclusively deemed to have been abandoned under 43 CFR 3833.4(a).

Clair R. Caldwell et al., 42 IBLA 139 (Aug. 16, 1979)

Under 43 CFR 3833.2-1, the owner of two unpatented mining claims, one located Sept. 16, 1976, and recorded with BLM May 3, 1977, and one located Feb. 1, 1977, and recorded with BLM Feb. 17, 1977, must have filed affidavits of assessment work or notices of intention to hold the mining claims for both claims prior to Dec. 31 of the calendar year, 1978, to prevent the claims from being conclusively deemed to have been abandoned under 43 CFR 3833.4(a).

Amanda Mining & Manufacturing Ass'n., 42 IBLA 144 (Aug. 16, 1979)

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of an application by State of Alaska to select lands segregates those lands from all subsequent appropriations, including locations under the mining law. A mining claim located on land which has been segregated and closed to mineral entry is properly declared null and void ab initio.

John C. Schandelmeier, 42 IBLA 240 (Aug. 22, 1979)

Sec. 314 of the Federal Land Policy and Management Act of 1976 was enacted to establish a Federal recording system for mining claims to facilitate Federal land use planning and management. Failure to comply with the mandatory filing requirements constitutes abandonment of the claim and the land reverts to the status of public domain.

In the absence of a specific regulation or policy directive specifying the type of proof necessary for recordation, the Bureau of Land Management should liberally consider attempts by a mining claimant under sec. 314 of the Federal Land and Policy Management Act to record notice of a mining claim where proof of recording cannot be made and 30 U.S.C. § 38 (1976) is relied upon for holding the claim, and before rejecting a filing for such a claim, BLM should request further evidence from the claimant which it would consider satisfactory. Such evidence should include at a minimum the name the claim is and has been known by, the name and address of the claimant, an adequate description of the claim, the type of claim, the time of holding and working the claim to meet a State's statute of limitations and, if possible, the date of the origin of claimant's title and facts as to continuation of possession of the claim, and any other information available showing a chain of title to the claimant and bearing upon the possession and occupancy of the claim for mining purposes, and

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

other information which the Bureau of Land Management deems essential to meet the purposes of the recordation provision.

Philip Sayer, 42 IBLA 296 (Aug. 27, 1979)

The regulation, 43 CFR 3833.2-1(b)(1), requiring evidence of assessment work to be filed prior to Dec. 31 of the year following location of the claim, is mandatory. Failure to comply therewith must result in a finding that the claim has been abandoned.

Donald L. Fulgham, 42 IBLA 338 (Aug. 30, 1979)

The regulations governing recordation of mining claims are mandatory, and failure to comply therewith must result in a finding that the claim has been abandoned. Where appellants timely file for record an "amended" location notice, accompanied by the original location notice which is untimely on its face, the mining claim is properly deemed abandoned as to the original location, but not as to the "amended" claim if it is a relocation of the claim under the law.

Walter T. Paul, James H. Meyer, 43 IBLA 119 (Sept. 24, 1979)

Under 43 CFR 3833.2-1 the owner of unpatented mining claims located after Oct. 21, 1976, and recorded with the Bureau of Land Management in Nov. 1977, must have filed affidavits of assessment work or notices of intention to hold the mining claims prior to Dec. 31, 1978, to prevent the claims from being conclusively deemed to have been abandoned under 43 CFR 3833.4(a).

Roger Kuhn, 43 IBLA 182 (Sept. 28, 1979)

REPEALERS

The Act of Feb. 15, 1901, 43 U.S.C. § 959 (1970), was repealed by sec. 706 of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2793, and any use or occupancy of public land granted subsequent to the effective date of FLPMA, Oct. 21, 1976, must be issued under authority of that Act. In authorizing the Secretary to grant rights-of-way, FLPMA provides that the Secretary shall require the applicant to submit certain information relating to the right-of-way, and a State Office notice enumerating such requirements is consistent with FLPMA.

William J. Colman, 40 IBLA 180 (Apr. 3, 1979)

R.S. 2387, 2388 and 2389, 43 U.S.C. §§ 718-720 (1976), were repealed by sec. 703 of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2790, and any transfer of land for a townsite within a National Forest after the effective date of FLPMA, Oct. 21, 1976, must be made under authority of sec. 213 of that Act. The filing of an application under other statutes prior to the enactment of FLPMA does nor constitute a valid existing right which would survive FLPMA.

Townsite of Liberty, 40 IBLA 317 (Apr. 30, 1979)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY

Applications for rights-of-way on public lands pending on Oct. 22, 1976, are to be considered as applications under Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), but existing regulations will govern the administration of public lands to the extent practical until new regulations are promulgated.

Under sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C.A. § 1764(g) (West Supp. 1978), payments for use of right-of-way sites should be on an annual basis at the fair market value unless the annual payment would be less than $100. Therefore, although lands may be appraised for a longer future period of time, lump-sum payments for future years may not be demanded for amounts exceeding the statutory amount; instead charges for such amounts should be made on an annual basis.

Donald R. Clark, C. Reinhart & Son, Inc., Hartwell Excavating Co., 39 IBLA 182 (Jan. 31, 1979)

The Act of Feb. 15, 1901, 43 U.S.C. § 959 (1970), was repealed by sec. 706 of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2793, and any use or occupancy of public land granted subsequent to the effective date of FLPMA, Oct. 21, 1976, must be issued under authority of that Act. In authorizing the Secretary to grant rights-of-way, FLPMA provides that the Secretary shall require the applicant to submit certain information relating to the right-of-way, and a State Office notice enumerating such requirements is consistent with FLPMA.

William J. Colman, 40 IBLA 180 (Apr. 3, 1979)

Under the Federal Land Policy and Management Act of 1976, approval for a right-of-way for a timber access road is discretionary. A decision by BLM rejecting such an application will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest.

Lowell Durham, 40 IBLA 209 (Apr. 10, 1979)

Pending applications for rights-of-way filed under the Acts of Feb. 15, 1901, and Mar. 4, 1911, shall be considered as applications under the Federal Land Policy and Management Act of 1976.

The granting of a right-of-way under FLPMA and the superseded Acts of Feb. 15, 1901, and Mar. 4, 1911, is within the Secretary's discretion and neither the filing of the application nor the existence of improvements earns appellant a right to the right-of-way. No rights vest in the applicant until the grant is approved by the Secretary. An application for a right-of-way is properly rejected where the land is in an interim conveyance to a Native Corporation.

"Public Lands." Land within an interim conveyance to a Native Corporation is no longer "public land" under the Federal Land Policy and Management Act nor subject to Bureau of Land Management jurisdiction to issue rights-of-way under that Act.

New England Fish Co., 42 IBLA 200 (Aug. 22, 1979)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RULES AND REGULATIONS

Where a mining claim is located after the enactment of the Federal Land Policy and Management Act of 1976 (Oct. 21, 1976), but before the date of promulgation of regulations implementing the statutory requirements of the Act relative to the recordation of mining claims, a regulation having retroactive effects may nonetheless be sustained in spite of such retroactivity if it is reasonable.

Elbert O. Jensen, 39 IBLA 62 (Jan. 17, 1979)

SERVICE CHARGES

The owner of an unpatented mining claim located after Oct. 21, 1976, on Federal land shall file within 90 days after the date of location of that claim in the proper BLM office a copy of the official record of the notice or certificate of location of the claim filed under State law. A copy of the notice or certificate shall be supplemented by, inter alia: (1) a map with a scale of not less than one-quarter inch to a mile showing the survey or protraction grids on which there will be depicted the location of the claim or site; and (2) a $5 service fee (nonreturnable) for each claim filed. Failure to file such instruments within the proper time period shall be deemed conclusively to constitute an abandonment of the mining claim, and it shall be void.

Where a mining claim is located after the enactment of the Federal Land Policy and Management Act of 1976 (Oct. 21, 1976), but before the date of promulgation of regulations implementing the statutory requirements of the Act relative to the recordation of mining claims, a regulation having retroactive effects may nonetheless be sustained in spite of snch retroactivity if it is reasonable.

Elbert O. Jensen, 39 IBLA 62 (Jan. 17, 1979)

WILDERNESS

Sec. 603 requires the Secretary to study all roadless areas of 5,000 acres or more and roadless islands with wilderness characteristics, and report his recommendations to the President as to the suitability or nonsuitability for preservation as wilderness of each snch area. The Secretary may not make multiple-nse tradeoffs in determining which public land areas qualify for wilderness study status.

For the purpose of BLM wilderness review, the term "roadless" means the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitnte a road.

Sec. 603(a) reguires that the Secretary report to the President by July 1, 1980, his recommendations as to the suitability for wilderness preservation of all formally identified natural or primitive areas designated prior to Nov. 1, 1975. Only those areas for which a notice of designation was published in the Federal Register are subject to this accelerated review and reporting requirement.

Sec. 603 of FLPMA does not apply to those areas of the Oregon and California and Coos Bay Wagon Road lands which are being managed for commercial timber production. Sec. 603 does apply to those areas not being managed for commercial timber production.

Prior to completion of the initial wilderness inventory and identification of the wilderness study areas, wilderness characteristics mnst be evaluated before the

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

WILDERNESS--Continued

Secretary authorizes any new activities which would destroy wilderness qualities. Discretionary activities must be conditioned to prevent impairment of an area's potential for wilderness designation.

During the review of wilderness study areas, and until Congress acts on the President's recommendations, the Secretary must manage study areas to prevent impairment of their suitability for wilderness designation, with certain limited exceptions.

Management of sec. 603 study areas should be guided by the principle that developmental activity must be carefully regulated to insure it is compatible with wilderness, or that its imprint on wilderness is temporary.

Sec. 603 provides that mining, grazing, and mineral leasing may continue in wilderness study areas in the same manner and degree as on Oct. 21, 1976, even if impairment of an area's suitability for wilderness results.

The words "existing" and "manner and degree" in sec. 603(c) shcuild be read in conjunction with the words "mining and grazing uses" to establish as a benchmark the physical and aesthetic impact a mining or grazing activity was having on an identified or potential wilderness study area on Oct. 21, 1976.

The existing mining use exception for mining and mineral leasing is limited geographically by the area of active development, and the logical adjacent continuation of the existing activity, not necessarily the boundary of the particular mining claim or mineral lease on which the operation is located.

When the impact from mining and grazing activities on a wilderness study area differs in manner and degree from the impact from such activity on Oct. 21, 1976, the Secretary mnst regulate the activity to prevent impairment of the area's suitability for preservation as wilderness.

The word "existing" in sec. 603(c) modifies "mineral leasing" in the same manner as it modifies "mining and grazing uses."

The Secretary is vested with the authority and responsibility to regulate all activities in wilderness study areas to prevent unnecessary and undue degradation and to afford environmental protection.

Areas under review for designation as wilderness remain available for appropriation under the mining laws, unless withdrawn for reasons other than protection of wilderness.

Interpretation of Sec. 603 of the Federal Land Policy and Management Act of 1976 - Bureau of Land Management (BLM) Wilderness Study, M-36910 (Feb. 13, 1979)
86 I.D. 89

Where the land embraced in a proposed oil and gas lease, to be issued subsequent to the enactment of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (1976), has been identified as having wilderness characteristics and is being reviewed for possible preservation as wilderness pursuant to sec. 603 of that Act, it is proper for the Bureau of Land Management to require the execution of a special stipulation providing that consent to oil and gas operations will not be given if it is determined that such operations will impair the land's wilderness characteristics.

Where the land embraced in a proposed oil and gas lease has been identified as having wilderness characteristics and is being reviewed for possible preservation as wilderness pursuant to sec. 603 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782 (1976), it is proper for the Bureau of Land Management to require the execution of a special stipulation providing that

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

WILDERNESS--Continued

oil and gas operations are subject to regulation where the obvious aim is protecting the wilderness values inherent in the land.

Reserve Oil, Inc., et al., 42 IBLA 190 (Aug. 22, 1979)

GEOLOGICAL SURVEY

It is not proper to deny a creditable request for approval of unavoidable delay time under sec. 16 of the Santa Ynez Unit Agreement, even though the Geological Survey considers the unit agreement extended by diligent drilling operations.

Exxon Co., U.S.A., 41 IBLA 118 (June 13, 1979)

The U.S. Geological Survey is the technical expert of the Department in matters concerning geologic evaluation of oil and gas lease production, and the Secretary is entitled to rely on the Survey's determinations, as to the extent of the participating area of a unit, absent a clear showing of error.

Amoco Production Co., 41 IBLA 348 (July 11, 1979)

Generally the Geological Survey may reconsider and modify or revoke its own decision in the absence of an appeal to the Board of Land Appeals. However, the filing of an appeal to the Board removes the matter from the jurisdiction of Survey pending disposition of the appeal.

Where Geological Survey and one of two parties to a compulsory unitization of two outer continental shelf oil and gas leases request a remand of a Survey decision for further consideration, and certain issues raised on appeal would appropriately be better first considered by Survey, the case will be remanded to Survey. In the circumstances, a request to stay implementation of Survey's prior decision may be granted by the Board unless and until Survey acts upon the request when it reconsiders the case.

Sun Oil Co., 42 IBLA 254 (Aug. 23, 1979)

GEOTHERMAL LEASES

GENERALLY

A stipulation requiring an offeror under a geothermal resources lease to provide a certified statement by a qualified archaeologist concerning the existence of archaeological values on lands to be disturbed by the lessee and to accept reasonable conditions of use for the protection of such areas and which requires the lessee to bear the cost of salvaging objects of antiquity is reasonable and will be upheld.

Western Oil Shale Corp., 41 IBLA 105 (June 11, 1979)

It is proper to reject an application for a geothermal resources lease where equitable title to the resource in issue is doubtful.

Dennis Potts, 42 IBLA 355 (Sept. 11, 1979)

GEOTHERMAL LEASES--Continued

APPLICATIONS

Generally

It is proper to reject an application for a geothermal resources lease where equitable title to the resource in issue is doubtful.

Dennis Potts, 42 IBLA 355 (Sept. 11, 1979)

ASSIGNMENTS OR TRANSFERS

A geothermal lease which has automatically terminated by operation of law for failure to submit the annual rental timely may be reinstated only where the lessee shows that the late payment of the rental was either justified or not due to a lack of reasonable diligence. The fact that an assignment application is pending does not justify a late payment of the rental either by the lessee or by the prospective assignee.

Supron Energy Corp., 40 IBLA 68 (Mar. 16, 1979)

DISCRETION TO LEASE

It is proper to reject an application for a geothermal resources lease where equitable title to the resource in issue is doubtful.

Dennis Potts, 42 IBLA 355 (Sept. 11, 1979)

LANDS SUBJECT TO

It is proper to reject an application for a geothermal resources lease where equitable title to the resource in issue is doubtful.

Dennis Potts, 42 IBLA 355 (Sept. 11, 1979)

REINSTATEMENT

A geothermal lease which has automatically terminated by operation of law for failure to submit the annual rental timely may be reinstated only where the lessee shows that the late payment of the rental was either justified or not due to a lack of reasonable diligence. The fact that an assignment application is pending does not justify a late payment of the rental either by the lessee or by the prospective assignee.

Supron Energy Corp., 40 IBLA 68 (Mar. 16, 1979)

To constitute a justifiable excuse for delay in making a rental payment sufficient to warrant reinstatement of a lease terminated for late payment of rental, a lessee must show that the delay was caused by factors outside his control which were the proximate cause of his failure to pay the rental timely. The negligence of an employee in failing to convey essential information to his employer regarding the necessity of making a timely payment does not constitute justification.

O'Brien Resources Corp., Thermal Power Co., 41 IBLA 367 (July 23, 1979)

STIPULATIONS

A stipulation requiring an offeror under a geothermal resources lease to provide a certified statement by a qualified archaeologist concerning the existence of archaeological values on lands to be disturbed by the lessee and to accept reasonable conditions of use for the protection of such areas and which requires the

GEOTHERMAL LEASES--Continued

STIPULATIONS--Continued

lessee to bear the cost of salvaging objects of antiquity is reasonable and will be upheld.

Western Oil Shale Corp., 41 IBLA 105 (June 11, 1979)

TERMINATION

A geothermal lease which has automatically terminated by operation of law for failure to submit the annual rental timely may be reinstated only where the lessee shows that the late payment of the rental was either justified or not due to a lack of reasonable diligence. The fact that an assignment application is pending does not justify a late payment of the rental either by the lessee or by the prospective assignee.

Supron Energy Corp., 40 IBLA 68 (Mar. 16, 1979)

GRAZING AND GRAZING LANDS

Where an applicant for a range improvement project involving alteration of the Native range by reseeding with non-Native species and requiring the expenditure of a large sum of public funds does not show that there is an urgent situation requiring immediate improvement of the range as proposed, a decision by the BLM range manager denying the application because management framework and allotment management plans have not been formulated is properly affirmed, as, ordinarily, such a venture should not be undertaken without the type of information these plans are intended to provide.

Loyd Sorensen, Von L. Sorensen, Kenneth Jones, 41 IBLA 354 (July 20, 1979)

GRAZING LEASES

GENERALLY

An area manager's decision apportioning lands between two grazing lease applicants ordinarily will not be disturbed where both applicants have equal preference rights, the apportionment is consistent with the regulatory criteria of 43 CFR 4121.2-1(d)(2), and the decision is not shown to be arbitrary or capricious. However, where a new statute, sec. 402 of the Federal Land Policy and Management Act of 1976, 43 U.S.C.A. § 1752(c) (West Supp. 1978), dictates that in certain circumstances "the holder of the expiring permit or lease shall be given first priority for receipt of the new permit or lease," the apportionment must be conformed therewith.

In view of 43 U.S.C.A. § 1752(c) (West Supp. 1978), which dictates that in certain circumstances the present grazing user shall have a right of first refusal for any new lease, 43 CFR 4110.5 (43 FR 29070), must be read in pari materia therewith and with 43 CFR 4130.2(e) (43 FR 29072) to be construed as a valid regulation and must be interpreted not to apply where the present grazing user desires a new lease and otherwise meets the statutory and regulatory criteria.

Harvey Sheehan and Hazel Holland Mudon, 39 IBLA 56 (Jan. 16, 1979) 86 I.D. 51

GRAZING LEASES--Continued

GENERALLY--Continued

A district manager's decision reached in the exercise of administrative discretion pursuant to the Taylor Grazing Act of 1934 may be regarded as arbitrary or capricious only where it is not supportable on any rational basis and the burden is on the appellant to show by substantial evidence that the decision is improper. A district manager's decision not to reissue a grazing lease for a certain area until that area is fenced and to reduce appellant's AUM's accordingly rests on a rational basis where the facts show that this unfenced area adjoins the bombing range and grazing thereon could result in trespass on the bombing range, inconsistent with the use of the range.

Under the Supremacy Clause, U.S. CONST., art. VI, cl. 2, Federal laws, including Federal grazing regulations, override conflicting State laws with respect to public lands.

Colvin Cattle Co., Inc., 39 IBLA 176 (Jan. 30, 1979)

Where two conflicting grazing lease applications are filed under the Taylor Grazing Act, as amended, 43 U.S.C. § 314m (1976), and one applicant owns base property of 320 acres which supports a preference right for the grazing lease, which base property the other applicant formerly leased from a previous owner to support a grazing lease, the grazing lease is properly issued to the applicant who is the present owner of the base property because such property has historically been used in connection with that grazing lease and the base controlled by the other applicant is only 80 acres.

A decision of the district manager rejecting a grazing lease application will not be disturbed on appeal in the absence of a showing that the decision is not reasonable or does not comport with statutory or regulatory standards, and where the decision appealed from is consonant with good range management.

Ted Crum, 40 IBLA 129 (Mar. 28, 1979)

In view of 43 U.S.C. § 1752(c) (1976), which dictates that in certain circumstances the holder of the expiring grazing lease shall be given first priority for receipt of the new lease, a district manager's decision apportioning lands between conflicting lease applicants will not be disturbed where holders of the expiring lease receive the land except for a portion and do not appeal the award of the portion to a conflicting applicant, thus waiving their preference right to said portion.

Cub River Stockmen's Association, 42 IBLA 26 (July 26, 1979)

APPLICATIONS

Where two conflicting grazing lease applications are filed under the Taylor Grazing Act, as amended, 43 U.S.C. § 314m (1976), and one applicant owns base property of 320 acres which supports a preference right for the grazing lease, which base property the other applicant formerly leased from a previous owner to support a grazing lease, the grazing lease is properly issued to the applicant who is the present owner of the base property because such property has historically been used in connection with that grazing lease and the base controlled by the other applicant is only 80 acres.

A decision of the district manager rejecting a grazing lease application will not be disturbed on appeal in the absence of a showing that the decision is not reasonable

GRAZING LEASES--Continued

APPLICATIONS--Continued

or does not comport with statutory or regulatory standards, and where the decision appealed from is consonant with good range management.

Ted Crum, 40 IBLA 129 (Mar. 28, 1979)

APPORTIONMENT OF LAND

An area manager's decision apportioning lands between two grazing lease applicants ordinarily will not be disturbed where both applicants have equal preference rights, the apportionment is consistent with the regulatory criteria of 43 CFR 4121.2-1(d)(2), and the decision is not shown to be arbitrary or capricious. However, where a new statute, sec. 402 of the Federal Land Policy and Management Act of 1976, 43 U.S.C.A. § 1752(c) (West Supp. 1978), dictates that in certain circumstances "the holder of the expiring permit or lease shall be given first priority for receipt of the new permit or lease," the apportionment must be conformed therewith.

In view of 43 U.S.C.A. § 1752(c) (West Supp. 1978), which dictates that in certain circumstances the present grazing user shall have a right of first refusal for any new lease, 43 CFR 4110.5 (43 FR 29070), must be read in pari materia therewith and with 43 CFR 4130.2(e) (43 FR 29072) to be construed as a valid regulation and must be interpreted not to apply where the present grazing user desires a new lease and otherwise meets the statutory and regulatory criteria.

Harvey Sheehan and Hazel Holland Mudon, 39 IBLA 56 (Jan. 16, 1979) 86 I.D. 51

In view of 43 U.S.C. § 1752(c) (1976), which dictates that in certain circumstances the holder of the expiring grazing lease shall be given first priority for receipt of the new lease, a district manager's decision apportioning lands between conflicting lease applicants will not be disturbed where holders of the expiring lease receive the land except for a portion and do not appeal the award of the portion to a conflicting applicant, thus waiving their preference right to said portion.

Cub River Stockmen's Association, 42 IBLA 26 (July 26, 1979)

CANCELLATION OR REDUCTION

A district manager's decision reached in the exercise of administrative discretion pursuant to the Taylor Grazing Act of 1934 may be regarded as arbitrary or capricious only where it is not supportable on any rational basis and the burden is on the appellant to show by substantial evidence that the decision is improper. A district manager's decision not to reissue a grazing lease for a certain area until that area is fenced and to reduce appellant's AUM's accordingly rests on a rational basis where the facts show that this unfenced area adjoins the bombing range and grazing thereon could result in trespass on the bombing range, inconsistent with the use of the range.

Colvin Cattle Co., Inc., 39 IBLA 176 (Jan. 30, 1979)

A grazing lease issued under the Alaska Grazing Act, 43 U.S.C. § 316 et seq. (1970), appropriates the lands and segregates them from the public domain, barring

GRAZING LEASES--Continued

CANCELLATION OR REDUCTION--Continued

them from use and occupancy for Native allotment purposes until the Department takes action to exclude lands from the lease.

Herman Anderson, Jr., Nicholas Pestrikoff, Anthony Drabek, 41 IBLA 296 (June 29, 1979)

PREFERENCE RIGHT APPLICANTS

Where two conflicting grazing lease applications are filed under the Taylor Grazing Act, as amended, 43 U.S.C. § 314m (1976), and one applicant owns base property of 320 acres which supports a preference right for the grazing lease, which base property the other applicant formerly leased from a previcus cwner to support a grazing lease, the grazing lease is properly issued to the applicant who is the present owner of the base property because such property has historically been used in connection with that grazing lease and the base controlled by the other applicant is only 80 acres.

Ted Crum, 40 IBLA 129 (Mar. 28, 1979)

Where two preference right applicants file conflicting applications for a grazing lease, sec. 402(c) of FLPMA, 43 U.S.C. § 1752(c) (1976), mandates issuance of the new lease to the holder of the expiring lease provided that the holder of the expiring lease maintains his or her preference right qualifications and is ctherwise in conformance with the applicable rules and regulations.

Earl W. Platt, 43 IBLA 41 (Sept. 18, 1979) 86 I.D. 458

RENEWAL

Where two preference right applicants file conflicting applications for a grazing lease, sec. 402(c) of FLPMA, 43 U.S.C. § 1752(c) (1976), mandates issuance of the new lease to the holder of the expiring lease provided that the holder of the expiring lease maintains his or her preference right qualifications and is otherwise in conformance with the applicable rules and regulations.

Earl W. Platt, 43 IBLA 41 (Sept. 18, 1979) 86 I.D. 458

GRAZING PERMITS AND LICENSES

GENERALLY

Estoppel to preclude a charge of trespass is not invoked against BLM where BLM's partially completed fences on Federal land do not restrain cattle and there is nc evidence that BLM agreed to construct and/or maintain said fences for the benefit of the grazier, and such grazier was at all times aware of these facts.

The grazing regulations (43 CFR 4140.1(b)(1), inter alia) (formerly 43 CFR 4112.3-1(a) and (b)) place the responsibility of controlling cattle squarely on the grazier, and Government range management policies as implemented under acts of Congress cannot be asserted to bar sanctions where trespasses have been proved, or to estop BLM from alleging trespasses.

An administrative law judge's finding that trespasses were willful, grossly negligent, and repeated will not be disturbed on appeal where the record amply supports such finding.

Where penalties imposed by two administrative law judges for trespasses are supported by the records and comport with the proscriptions of the regulations they

GRAZING PERMITS AND LICENSES--Continued

GENERALLY--Continued

will not be modified on appeal except insofar as they conflict with respect to a particular grazier in a particular grazing district.

Bureau of Land Management v. Holland Livestock Ranch et al., 39 IBLA 272 (Feb. 15, 1979) 86 I.D. 133

Where an applicant for a range improvement project involving alteration of the Native range by reseeding with non-Native species and requiring the expenditure of a large sum of public funds does not show that there is an urgent situation requiring immediate improvement of the range as proposed, a decision by the BLM range manager denying the application because management framework and allotment management plans have not been formulated is properly affirmed, as, ordinarily, such a venture should not be undertaken without the type of information these plans are intended to provide.

Loyd Sorensen, Von L. Sorensen, Kenneth Jones, 41 IBLA 354 (July 20, 1979)

Past trespass, trespass damages, and trespass settlements may properly be considered in determining whether trespasses are repeated for the purpose of computing the damages to be assessed.

Bureau of Land Management v. Harris Brothers, 42 IBLA 48 (July 31, 1979)

APPEALS

An appeal from a decision of an administrative law judge dismissing an appeal relating to grazing privileges for failure to state clearly and concisely the reasons for appeal will be dismissed where appellant does not clearly show error in the decision being appealed.

Rondall Brady, 42 IBLA 341 (Aug. 31, 1979)

BASE PROPERTY (LAND)

Ownership or Control

Where a grazing permittee owned base property taken in condemnation proceedings by the United States, but a Federal district court has stayed the United States from taking exclusive possession of the property and granted joint possession to the condemnor agency and the permittee pending disposition of an appeal on a motion to revest the property in the permittee, implementation of a decision canceling grazing privileges for loss of control of base property under 43 CFR 4110.1 (1975) will be stayed in accordance with the conrt order.

Bureau of Land Management v. William J. Thoman, 41 IBLA 110 (June 11, 1979)

CANCELLATION OR REDUCTION

An administrative law judge's finding that trespasses were willful, grossly negligent, and repeated will not be disturbed on appeal where the record amply supports such finding.

Where penalties imposed by two administrative law judges for trespasses are snpported by the records and comport with the proscriptions of the regulations they will not be modified on appeal except insofar as they

GRAZING PERMITS AND LICENSES--Continued

CANCELLATICN OR REDUCTION--Continued

conflict with respect to a particular grazier in a particular grazing district.

Bureau of Iand Management v. Holland Livestock Ranch et al., 39 IBLA 272 (Feb. 15, 1979) 86 I.D. 133

TRESPASS

Where the evidence as to specific trespass indicates that of a number of cattle counted some were located on private intermingled land, but there were no barriers, either natural or artificial, which would have prevented the cattle on private land from going onto the public land, it is proper to find that all cattle counted would tend to consume forage at a rate proportional to the ratio of forage available on private and public lands.

An administrative law judge's finding that trespasses were willful, grossly negligent, and repeated will not be disturbed on appeal where the record amply supports such finding.

Where penalties imposed by two administrative law judges for trespasses are supported by the records and comport with the proscriptions of the regulations they will not be modified on appeal except insofar as they conflict with respect to a particular grazier in a particular grazing district.

Bureau of Land Management v. Holland Livestock Ranch et al., 39 IBLA 272 (Feb. 15, 1979) 86 I.D. 133

Past trespass, trespass damages, and trespass settlements may properly be considered in determining whether trespasses are repeated for the purpose of computing the damages to be assessed.

Where the evidence shows that the commercial rate for forage ranged from $2.50 to $9.50 per AUM, an Administrative Law Judge's computation of damages, using $3.50 as the base figure, cannot be said to be unreasonable under 43 CFR 9239.3-2 (1976).

Bureau of Land Management v. Harris Brothers, 42 IBLA 48 (July 31, 1979)

HEARINGS

The notice and opportunity for hearing envisaged by 43 CFR 2802.1-7(e) requires at a minimum that the lessee be provided with a copy of the appraisal report, that he be permitted to appear before the decisionmaker, that the decisionmaker not be the person who made or approved the appraisal, and that adequate records of the hearing conducted pursuant to the regulations be maintained.

Donald R. Clark, C. Reinhart & Son, Inc., Hartwell Excavating Co., 39 IBLA 182 (Jan. 31, 1979)

Where there are conflicting applications for a lot in a Native townsite and the evidence as to who has the better claim is vague and inconclusive, the townsite trustee should submit the matter for a hearing before an administrative law judge. 43 CFR 2565.4(b).

James T. Friedman, 39 IBLA 229 (Feb. 12, 1979)

HEARINGS--Continued

When on appeal a sufficient showing is made to call into question a determination that land lies within a known geologic structure of a producing oil or gas field, and a hearing is requested, the decision may be set aside and remanded for hearing.

Jack J. Bender, 40 IBLA 26 (Mar. 9, 1979)

Mining claims purportedly located on land not available for such location confer no property right upon the locator, and may be declared null and void ab initio without a hearing under 5 U.S.C. § 554 et seq. (1976).

"Contest." A decision declaring claims located on withdrawn lands to be null and void ab initio is not a "contest" and regulations under 43 CFR 4.451 et seq., relating to mining contests, have no application.

Delmer McLean et al., 40 IBLA 34 (Mar. 15, 1979)

Where production has ceased on an oil and gas lease extended by production, and the record is unclear whether the conditions prescribed by 30 U.S.C. § 226(f) (1976) precluding termination of the lease have occurred, the case will be remanded to the Bureau of Land Management to reconsider with the Geological Survey if the lease has terminated, including a determination whether the lessee began reworking or drilling operations within 60 days after cessation of production and diligently prosecuted such operations before attaining production as asserted by him on appeal. A hearing should be held, if necessary, to resolve disputed facts.

Vern H. Bolinder and Julienne J. Bolinder, 40 IBLA 164 (Apr. 3, 1979)

Where the Geological Survey, in making its decision, has reviewed the same information submitted on appeal to the Board of Land Appeals to show that there was a well capable of producing oil or gas in paying quantities on the date the lease expired, and there are no disputed facts, but only a dispute on the proper application of the law to those facts and legal interpretations, a hearing is not warranted in the case.

American Resources Management Corp., 40 IBLA 195 (Apr. 5, 1979)

Where the Bureau of Land Management determines that an Alaska Native allotment application should be rejected because the land was not used and occupied by the applicant, the BLM shall issue a contest complaint pursuant to 43 CFR 4.451 et seq. Upon receiving a timely answer to the complaint, which answer raises a disputed issue of material fact, the Bureau will forward the case file to the Hearings Division, Office of Hearings and Appeals, Department of the Interior, for assignment of an administrative law judge, who will proceed to schedule a hearing, at which the applicant may produce evidence to establish entitlement to his allotment.

John Moore et al., 40 IBLA 321 (Apr. 30, 1979)
86 I.D. 279

Where Bureau of Land Management determines an application for a Native allotment should be rejected for failure to establish use and occupancy of the land, Bureau of Land Management should initiate a contest proceeding pursuant to 43 CFR 4.451 et seq.

Frederick Phillips et al., 41 IBLA 169 (June 22, 1979)

Ella S. Sheldon et al., 42 IBLA 276 (Aug. 27, 1979)

HEARINGS--Continued

Where the Bureau of Land Management (BLM) determines that an Alaska Native allotment application should be rejected in part because the Native did not use all of the land applied for, the BLM shall initiate a contest proceeding pursuant to 43 CFR 4.451 et seq.

Frank Rulland, 41 IBLA 207 (June 27, 1979) 86 I.D. 342

Where legal conclusions are reached in an appellate decision upon undisputed facts, and there has been no proffer of further facts which could compel different legal conclusions, no useful purpose would be served for a hearing, and a request therefor is properly denied.

Floyd L. Anderson, Sr., 41 IBLA 280 (June 28, 1979)
86 I.D. 345

Peter Panruk, 43 IBLA 69 (Sept. 19, 1979)

A hearing is properly ordered where there exist issues of fact the resolution of which will determine whether an oil and gas lease concluding its primary term was converted from rental status to royalty status. Appellant shall have the burden of proof to establish by a preponderance of the evidence (a) that the Dolezal-Government #1 well was capable of producing oil and gas in paying quantities on Oct. 31, 1978, or (b) that there was a discovery of oil or gas in paying quantities on lease W 15891 on Oct. 31, 1978. If either (or both) of these propositions is established, the subject lease was not subject to automatic termination by law for failure to make timely rental payment.

Coronado Oil Co., 42 IBLA 235 (Aug. 22, 1979)

Where an applicant for a Native allotment alleges for the first time on appeal his use and occupancy of lands prior to their withdrawal, a decision rejecting the Native's application shall be vacated and the case remanded to BLM for its consideration of appellant's new evidence.

Charles L. John, 42 IBLA 260 (Aug. 27, 1979)

A second hearing of a Government mining contest will not be afforded where a claimant was given notice and an opportunity to appear at a hearing, where he was actually present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result. A petition to reopen a hearing of a Government mining contest will be denied when the contestee offers no valid justification for the neglect to offer evidence which was or could have been available at the original hearing. A further hearing will not be ordered merely to afford a claimant an additional opportunity to explore and make a discovery.

United States v. Andy Syndbad, 42 IBLA 313 (Aug. 29, 1979)

HOMESTEADS (ORDINARY)

CONTESTS

A summary dismissal of a private contest against an Alaska homestead becomes a final administrative ruling on that contest when the contestant, instead of appealing the dismissal, files a second contest which must be considered an entirely new action. When a final departmental adjudication has been made, the doctrine of administrative finality, which is the administrative counterpart of the principle of res judicata, generally

HOMESTEADS (ORDINARY)--Continued

CONTESTS--Continued

bars consideration of a new appeal arising from a later proceeding involving the same homestead and the same issue.

A private contest brought against an Alaska homestead charging that the entryman had failed to meet any of the residence or cultivation requirements of the law must be dismissed where the statutory life of the entry has previously expired without the entryman filing final proof and information was already of record in the BLM office that the entryman had done nothing during the life of the entry to perfect the claim. 43 CFR 4.450-1.

Joe O. Amberger, 43 IBLA 178 (Sept. 28, 1979)

INDIAN ALLOTMENTS ON PUBLIC DOMAIN

GENERALLY

Where the Secretary of Agriculture has made a determination pursuant to sec. 31 of the Act of June 25, 1910, 36 Stat. 863, 25 U.S.C. § 337 (1976), that lands within a national forest are of no value for the timber found thereon and are of negligible value for agricultural or grazing purposes, the Secretary of the Interior may reject the allotment where the record shows that the land in question is not a viable economic agricultural unit.

Samuel C. George, 39 IBLA 399 (Mar. 2, 1979)

LANDS SUBJECT TO

Where the Secretary of Agriculture has made a determination pursuant to sec. 31 of the Act of June 25, 1910, 36 Stat. 863, 25 U.S.C. § 337 (1976), that lands within a national forest are of no value for the timber found thereon and are of negligible value for agricultural or grazing purposes, the Secretary of the Interior may reject the allotment where the record shows that the land in question is not a viable economic agricultural unit.

Samuel C. George, 39 IBLA 399 (Mar. 2, 1979)

Native occupancy and use commenced at a time when land is withdrawn from settlement, location, sale, or entry provides no basis for a Native allotment. Withdrawal of the land in 1940 by Exec. Order No. 8344, inclusion of the land in a grazing lease and homesite, and the subsequent selection of the land by the State of Alaska in 1966 have effectively kept the land closed to the initiation of rights under the Act of May 17, 1906, at all times during the period from 1940 to Dec. 18, 1971, when the Act was repealed by the Alaska Native Claims Settlement Act.

Although the Department has adhered to the principle of protecting Indian occupancy on public lands, it also has the responsibility of protecting rights of others to public land tenure, including persons who have been granted grazing leases under the Alaska Grazing Act of Mar. 4, 1927, as amended, 43 U.S.C. §§ 316, 316a-316o (1976).

Milton R. Pagano, 41 IBLA 214 (June 27, 1979)

Native use and occupancy commenced at a time when land is otherwise appropriated and segregated from such use and occupancy provides no basis for a claim under the Act of May 17, 1906. Inclusion of the subject lands in 1932 in a grazing lease, withdrawal of the lands in 1940, selection of the lands in 1967 by the State of Alaska, and subsequent withdrawals in 1973 pursuant to

INDIAN ALLOTMENTS ON PUBLIC DOMAIN--Continued

LANDS SUBJECT TO--Continued

the Alaska Native Claims Settlement Act have effectively kept the lands closed to the initiation of rights under the Act of May 17, 1906, at all times during the period from 1932 to Dec. 18, 1971, when the Act was repealed by sec. 18 of the Alaska Native Claims Settlement Act.

Although the Department has adhered to the principle of protecting Indian occupancy on public lands, it also has the responsibility of protecting rights of others to public land tenure, including persons who have been granted grazing leases under the Alaska Grazing Act of Mar. 4, 1927, as amended, 43 U.S.C. §§ 316, 316a-316o (1976).

Magnel E. Drabek, 41 IBLA 219 (June 27, 1979)

Settlement on land in Alaska which is subject to a grazing lease issued under the Alaska Grazing Act of Mar. 4, 1927, 43 U.S.C. §§ 316, 316a-316o (1976), does not create any rights by virtue of such settlement under the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 to 270-3 (1970), repealed by 43 U.S.C. § 1617 (1976), since such land is segregated from adverse appropriation at least until the Department takes action to cancel the grazing lease pro tanto, but the grazing lease does not preclude the filing of a State selection application which, when filed, segregates the land from all appropriation based upon settlement or location.

Floyd L. Anderson, Sr., 41 IBLA 280 (June 28, 1979)
86 I.D. 345

Withdrawal of land in 1940, inclusion of the land in a grazing lease under authority of the Alaska Grazing Act of Mar. 4, 1927, revocation of the withdrawal in 1961, and selection of the land by the State of Alaska under authority of the Statehood Act in 1963 effectively kept the land closed to the initiation of rights under the Native Allotment Act at all times during the period from 1940 to the revocation of the Allotment Act on Dec. 18, 1971, by sec. 18 of the Alaska Native Claims Settlement Act.

Norman Opheim, Billy Boskofsky, Jr. (As Heir of Nicholas Boskofsky), 41 IBLA 338 (July 11, 1979)

Where an applicant for a Native allotment alleges use and occupancy of lands which had previously been withdrawn in accordance with sec. 24, Federal Water Power Act of June 10, 1920, an application is properly denied despite the fact that a public land order designating the area a powersite classification is issued subsequent to the applicant's commencement of use and occupancy. Lands included in an application for powersite development under the Act shall from the date of filing of the application be reserved from entry, location, or other disposal under the laws of the United States, unless otherwise directed by the Federal Power Commission or by Congress.

Lindberg Alexander, 41 IBLA 382 (July 23, 1979)

Withdrawn lands are not open to appropriation under the Native Allotment Act. Appellant's settlement upon a tract of land withdrawn from entry is a trespass, and such settlement does not provide a basis for any claim to the land.

Publication in the Federal Register of PLO No. 3432 withdrawing certain lands in Alaska from all forms of

INDIAN ALLOTMENTS ON PUBLIC DOMAIN--Continued

LANDS SUBJECT TO--Continued

appropriation under the public land laws, except leasing under the mineral leasing laws, gives valid notice of its contents.

Elizabeth J. Martini, 42 IBLA 82 (Aug. 13, 1979)

Lands included in an application for powersite development under the Federal Power Act of June 10, 1920, 16 U.S.C. § 818 (1976), shall from the date of filing of the application be reserved from entry, location, or other disposal under the laws of the United States, unless otherwise directed by the Federal Power Commission or by Congress.

Charles L. John, 42 IBLA 260 (Aug. 27, 1979)

SETTLEMENT

Settlement on land in Alaska which is subject to a grazing lease issued under the Alaska Grazing Act of Mar. 4, 1927, 43 U.S.C. §§ 316, 316a-316o (1976), does not create any rights by virtue of such settlement under the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 to 270-3 (1970), repealed by 43 U.S.C. § 1617 (1976), since such land is segregated from adverse appropriation at least until the Department takes action to cancel the grazing lease pro tanto, but the grazing lease does not preclude the filing of a State selection application which, when filed, segregates the land from all appropriation based upon settlement or location.

Floyd L. Anderson, Sr., 41 IBLA 280 (June 28, 1979)
86 I.D. 345

INDIAN LANDS

GENERALLY

The Alaska Native Claims Settlement Act extinguished aboriginal occupancy claims of Alaska Natives; such claims cannot serve as a bar to a State selection, nor preclude the State from challenging Native allotment applications conflicting with its selection.

Under the "functional" standard to determine administrative standing set forth in Koniag, Inc. v. Andrus, 580 F.2d 601 (D.C. Cir. 1978), cert. denied, 99 S. Ct. 733 (1979), the State of Alaska has standing to challenge Native allotment applications conflicting with its selection applications even if the land is within a Native village selection area under the Alaska Native Claims Settlement Act. The State has standing under Departmental regulations to initiate private contests against such conflicting Native allotment applications.

State of Alaska et al., 41 IBLA 315 (July 11, 1979)
86 I.D. 361

ALLOTMENTS

Generally

Where a Native allotment application is filed before the death of an applicant, proof of the applicant's use and occupancy, if otherwise timely, may be filed by the appropriate official of the Bureau of Indian Affairs pursuant to 43 CFR 2561.2(a) after the applicant's death. A decision rejecting the application because the proof was filed after the applicant's death must be set aside where the proof is not inconsistent with the application. Further proceedings must be served upon the heirs, known or unknown, by

INDIAN LANDS--Continued

ALLOTMENTS--Continued

Generally--Continued

appropriate service, and also upon conflicting claimants, such as the State of Alaska.

Ernest L. Olson, Jr. (Deceased), 41 IBLA 179 (June 22, 1979)

Assuming, in the light most favorable to appellant, that the allotments at issue were subject to the final proviso of sec. 9 of the Act of Mar. 2, 1889, 25 Stat. 888, 891, we find no language in this or other sections of the Act evidencing an intention on the part of Congress that allotments--to be valid--required approval by the Oglala Sioux Tribe.

Appellant's contention that under sec. 22 of the Act of June 30, 1834, 4 Stat. 729, 733 (25 U.S.C. § 194 (1976)), the burden of proof cannot be assigned to the tribe is without merit. The issue framed by appellant does not align "Indians" against "whites." The primary relief sought by the tribe is the cancellation of trust patents which can only be held by Indians.

The issuance of a trust patent for an Indian allotment carries with it a presumption of proper performance as well as the implied finding of every fact made a prerequisite to the patent's issue.

In addition to contravening rights bestowed by the tribe's own constitution, appellant's position that members of the tribe cannot obtain fee patents to individually owned trust land violates express guarantees contained in the General Allotment Act and the Indian Reorganization Act, as amended.

Administrative Appeal of Oglala Sioux Tribe v. Commissioner of Indian Affairs and Richard Fall (PRO-10542), 7 IBIA 188 (Sept. 5, 1979) 86 I.D. 425

CEDED LANDS

When interpreting Federal agreements and statutes pertaining to Indian Affairs, one must consider the legislative history, as well as surrounding circumstances and subsequent administrative practices to determine what the parties intended, and in particular, what the Indians understood the agreement to mean. Doubtful expressions are to be resolved in the Indians' favor.

Congressional intent to modify or abrogate Indian property rights must be clear and cannot be lightly inferred.

The Agreement of Dec. 4, 1893, between the Yuma (now Quechan) Indians and the United States, ratified in the Act of Aug. 15, 1894 (28 Stat. 286, 332) provided for a conditional cession of the nonirrigable land of the Fort Yuma Reservation. The conditions which included allotment and sale of surplus irrigable land and the opening of nonirrigable lands to settlement and entry, did not occur during the decade following the agreement and ratifying statute.

Title to Certain Lands Within the Boundaries of the Fort Yuma (now called Quechan) Indian Reservation, M-36908 (Jan. 2, 1979) 86 I.D. 3

FEE LANDS

A decision by the Bureau of Land Management canceling fee simple patents issued to Indians and simultaneously issuing new Indian trust patents is not subject to review by the Board of Land Appeals, which has no jurisdiction in the matter, where the decision was made at

INDIAN LANDS--Continued

FEE LANDS--Continued

the direction of the Assistant Secretary for Indian Affairs.

Blue Star, Inc., Atomic Western, Inc., Fremont Energy Corp., Ivor Adair, 41 IBLA 333 (July 11, 1979)

IRRIGATION

Sec. 25 of the Act of Apr. 21, 1904 (33 Stat. 189, 224), which authorized the application of the 1902 Reclamation Act to the Fort Yuma and Colorado River Reservations, and which provided for the allotment and sale of surplus irrigable lands on those reservations, was unrelated to and was not intended to effect the conditional cession provided for in the 1893 agreement and the 1894 ratifying statute.

Title to Certain Lands Within the Boundaries of the Fort Yuma (now called Quechan) Indian Reservation, M-36908 (Jan. 2, 1979) 86 I.D. 3

LEASES AND PERMITS

Long-term Business/Agriculture

Rentals

The 20-percent limitation regarding rental adjustments appearing only in the ARBITRATION clause of the subject lease has no application to rental adjustments which may be effected pursuant to the RENTAL ADJUSTMENT clause of the lease and regulations.

Administrative Appeal of Norman R. Byrd v. Commissioner, Bureau of Indian Affairs, 7 IBIA 142 (May 11, 1979)

Oil and Gas

Tribal royalties from leases of Jicarilla Apache tribal lands cannot be taxed by the State of New Mexico.

Tax Status of the Production of Oil and Gas from Jicarilla Apache Tribal Lands Under the 1938 Indian Mineral Leasing Act, M-36896 (Supp.) (Mar. 2, 1979) 86 I.D. 181

OIL AND GAS LEASING

Generally

The language of the Treaty of Fort Laramie and the Executive Order of Apr. 12, 1870, when considered with the case law and various utterances made contemporaneously with the Treaty, discloses an intention to include the lands underlying the Missouri River, insofar as it runs through the Fort Berthold reservation, among the lands of the reservation itself.

Impel Energy Corp., 42 IBLA 105 (Aug. 16, 1979)

PATENT IN FEE

Generally

Under regulations in effect before Apr. 24, 1973, issuance of a fee patent to a competent Indian applicant was considered by the Department to be mandatory. On the foregoing date, however, 25 CFR Part 121 was revised to reflect the authority derived from the authorizing Acts

INDIAN LANDS--Continued

PATENT IN FEE--Continued

Generally--Continued

and to allow the exercise of discretion in the issuance of fee patents.

Administrative Appeal of Oglala Sioux Tribe v. Commissioner of Indian Affairs and Richard Tall (PRU-10542), 7 IBIA 188 (Sept. 5, 1979) 86 I.D. 425

Jurisdiction

A decision by the Bureau of Land Management canceling fee simple patents issued to Indians and simultaneously issuing new Indian trust patents is not subject to review by the Board of Land Appeals, which has no jurisdiction in the matter, where the decision was made at the direction of the Assistant Secretary for Indian Affairs.

Blue Star, Inc., Atomic Western, Inc., Fremont Energy Corp., Ivor Adair, 41 IBLA 333 (July 11, 1979)

TAXATION

The taxation proviso contained in 25 U.S.C. § 398c (1970) does not apply to leases entered into under the 1938 Leasing Act (25 U.S.C. §§ 396a-396f (1970)). States cannot tax tribal royalties from such leases.

Tax Status of the Production of Oil and Gas from Jicarilla Apache Tribal Lands Under the 1938 Indian Mineral Leasing Act, M-36896 (Supp.) (Mar. 2, 1979) 86 I.D. 181

INDIAN PROBATE

APPEAL

Administrative Law Judge as Trier of Facts

It has been consistently held that an examiner's (presently administrative law judge) findings based on that part of the evidence which printed words do not preserve are not ordinarily reviewable by the agency, and examiner's findings on veracity must not be overturned without very substantial preponderance in testimony as recorded.

Estate of Fannie Newrobe Choate, 7 IBIA 171 (July 31, 1979)

The weight and credibility of evidence are matters properly considered by an administrative law judge in the first instance. His findings, when in accord with the preponderance of the substantial and probative evidence adduced, will not be disturbed.

Where there is sufficient evidence to support the finding and testimony is conflicting the determination of witness credibility and the findings of the fact by examiner (now administrative law judge) will not be disturbed because only he had the opportunity to hear and observe the witnesses.

Estate of Roland Loyd (Mobeadlemah) Botone, 7 IBIA 177 (Aug. 16, 1979)

INDIAN PROBATE--Continued

APPEAL--Continued

Administrative Law Judge as Trier of Facts--Continued

The weight and credibility of evidence are matters properly considered by an Administrative Law Judge (in this matter, Examiner of Inheritance, Assistant Commissioner, Assistant Secretary of the Interior) in the first instance. His findings, when in accord with the preponderance of the substantial and probative evidence adduced, will not be distributed.

Estate of Guo-la a/k/a Thomas Jones, 7 IBIA 181 (Aug. 28, 1979)

CHILDREN, ILLEGITIMATE

Generally

In a case of illegitimacy, it is a reasonable presumption that a father may refrain from widely proclaiming parenthood. Here, however, the decedent had sworn before an officer of the court that he was the father of the appellee.

Estate of Asa Cottonwood, 7 IBIA 138 (Apr. 10, 1979)

CLAIM AGAINST ESTATE (See also DIVORCE--if included in this Index.)

Care and Support

Claim by devisee under a will for amount for care and support of decedent must be disallowed where not supported by facts and where the claimant had no expectation of payment, and none had been promised by decedent.

Estate of Cleveland Iron Shooter, 7 IBIA 212 (Sept. 12, 1979)

Proof of Claim

Alleged failure of hospital receiving Federal funding under Hill-Burton Act to provide free care as required by the Act does not bar the hospital's claim for care in an Indian probate proceeding where neither decedent nor those claiming to be his heirs had exhausted administrative procedures required by the Act to establish decedent's entitlement to free hospital care.

Estate of Cleveland Iron Shooter, 7 IBIA 212 (Sept. 12, 1979)

Source of Funds for Payment

Hospital bill in an amount larger than cash assets of trust estate must be paid according to regulations governing such payment as established by the Secretary of the Department of the Interior at 43 CFR 4.250 and 4.252.

Estate of Cleveland Iron Shooter, 7 IBIA 212 (Sept. 12, 1979)

CODE OF FEDERAL REGULATIONS (43 CFR Part 4 formerly Title 25 Part 15-Interpretation & Construction)

Generally

Hospital bill in an amount larger than cash assets of trust estate must be paid according to regulations governing such payment as established by the Secretary

CODE OF FEDERAL REGULATIONS (43 CFR Part 4 formerly Title 25 Part 15-Interpretation & Construction) --Continued

Generally--Continued

of the Department of the Interior at 43 CFR 4.250 and 4.252.

Estate of Cleveland Iron Shooter, 7 IBIA 212 (Sept. 12, 1979)

DIVORCE

Indian Custom

Generally

A divorce in accordance with Indian or tribal custom has long been recognized by the Congress, the courts, and the Department.

The courts have recognized Indian-custom divorces so long as the Indians continue in tribal relations.

In recognizing the validity of Indian-custom divorces, no distinction is made in the kind of marriage which such divorce dissolves so long as the parties contracting the marriage and effecting the divorce are Indian wards of the Government and living in tribal relations.

A divorce by Indian custom may be accomplished unilaterally by either of the parties to the marriage.

The validity of Indian-custom divorce depends on whether the parties were living in tribal relations and whether it was an accepted and recognized custom of the tribe involved.

Estate of Harold Humpy, 7 IBIA 118 (Mar. 29, 1979)

EVIDENCE

Hearsay Evidence

It has long been recognized that though hearsay evidence lacks certain guarantees of trustworthiness such as amenability to cross-examination, it may yet be relevant and have probative value. At any rate, we do not think the hearsay rule is applicable to administrative proceedings so long as the evidence upon which an order is ultimately based is both substantial and has probative value.

The requirement that the administrative findings accord with the substantial evidence does not forbid administrative utilization of probative hearsay in making such findings.

Estate of Guo-la a/k/a Thomas Jones, 7 IBIA 181 (Aug. 28, 1979)

Newly Discovered Evidence

Newly discovered evidence which is the same in nature as that previously considered does not present for consideration any new facts or evidence relative to petitioner's paternity and is merely cumulative of evidence already presented.

Estate of Guo-la a/k/a Thomas Jones, 7 IBIA 181 (Aug. 28, 1979)

INDIAN PROBATE--Continued

EVIDENCE--Continued

Presumptions

In a case of illegitimacy, it is a reasonable presumption that a father may refrain from widely proclaiming parenthood. Here, however, the decedent had sworn before an officer of the court that he was the father of the appellee.

Estate of Asa Cottonwood, 7 IBIA 138 (Apr. 10, 1979)

INDIAN REORGANIZATION ACT of June 18, 1934 (WHEELER-HOWARD ACT) (25 U.S.C. § 464 et seq.)

Construction of Section 4

Sec. 4 of Indian Reorganization Act of 1934 (25 U.S.C. § 464 (1976)) is not unconstitutionally discriminatory against named devisee of decedent's will where the Act operates to achieve a recognized aim of Indian legislation.

The reorganization of the Rosebud Sioux Tribe under a constitution and bylaws and a charter, pursuant to the Indian Reorganization Act of 1934, is a reasonable application of the Act and conforms to standards of reasonableness required in such cases. The self-determination, by the Tribe, of its own membership, was in furtherance of the Congressional purpose expressed by the 1934 Act, and was properly approved by the Department concerned.

So long as a scheme for testamentary disposition established by law and regulation conforms to some generally accepted purpose for disposition and organization of Indian trust property it will not be disturbed by the courts.

Estate of Cleveland Iron Shooter, 7 IBIA 212 (Sept. 12, 1979)

MARRIAGE

Common Law

To enter into a valid common-law marriage there has to be an actual and mutual agreement to enter into marital relationship, permanent and exclusive of all others, between capable persons in law making such contract, consummated by their cohabitation as man and wife or their mutual assumption openly of the marital duties and obligations.

Estate of Guo-la a/k/a Thomas Jones, 7 IBIA 181 (Aug. 28, 1979)

Indian Custom

Generally

A marriage contract between members of an Indian tribe in accordance with the customs of such tribe, where the tribal relations and government existed at the time of such marriage, and there is no Federal statute rendering the tribal customs invalid, will be recognized and upheld by the courts of this State (Oklahoma) as a regular and valid marriage for all purposes. Such marriages are not to be treated as common-law marriages, but as legal marriages, according to the custom of the tribe.

Estate of Guo-la a/k/a Thomas Jones, 7 IBIA 181 (Aug. 28, 1979)

INDIAN PROBATE--Continued

SECRETARY'S AUTHORITY

Generally

A proceeding for the determination of the heirs of a deceased Indian instituted in a case over which the Department has no jurisdiction must be dismissed.

Estate of William E. Hicks, 7 IBIA 115 (Feb. 14, 1979)

TRUST PROPERTY

Generally

In the event that the court approved agreement signed by decedent constituted a judgment against trust property, it is null and void absent approval by the Secretary of the Interior.

Estate of Asa Cottonwood, 7 IBIA 138 (Apr. 10, 1979)

WILLS (See also INHERITING--if included in this Index.)

Holographic Will

A holographic will that does not meet the requirement of attestation by two disinterested adult witnesses is invalid.

Estate of Emory Dennis Juneau, 7 IBIA 164 (June 29, 1979)

Proof of Will

Facts of the case justified a finding by the administrative law judge that there was a failure to prove will where testimony to show testamentary act was scanty and where purported will was undated and was marked "signed copy."

Estate of Cleveland Iron Shooter, 7 IBIA 212 (Sept. 12, 1979)

Publication

There is no requirement in the Indian probate regulations or the applicable statutes that the testatrix, at the time of the execution of her will, "publish" the same by openly declaring it to be her last will and testament.

Estate of Fannie Newrobe Choate, 7 IBIA 171 (July 31, 1979)

Testamentary Capacity

Generally

The burden of proof as to testamentary incapacity in Indian probate proceedings is on those contesting the will, and an Indian is not deemed to be incompetent to make a will by virtue of her being unable to manage her own property or business affairs or by appointment of a guardian for her.

Being aged and uneducated, being unable to read or write, being unable to understand the English language, and possessing impaired hearing and poor eyesight are conditions that do not necessarily disqualify one from making a will.

Estate of Fannie Newrobe Choate, 7 IBIA 171 (July 31, 1979)

INDIAN PROBATE--Continued

WILLS (See also INHERITING--if included in this Index.) --Continued

Undue Influence

Generally

To invalidate a will on the ground of undue influence contestants must show such influence to have been exerted to the extent of destroying the free will of the testatrix or that the will of another was substituted for that of the testatrix and this amounts to more than the opportunity or possibility that undue influence was brought to bear on the testatrix.

Estate of Fannie Newrobe Choate, 7 IBIA 171 (July 31, 1979)

Failure to Establish, Opportunity

The Department of the Interior has consistently held that mere suspicion or an opportunity to influence testatrix's mind will not sustain an allegation of undue influence where convincing proof is lacking that a person did actually exert influence or there was pressure operating directly upon the testamentary act.

Estate of Fannie Newrobe Choate, 7 IBIA 171 (July 31, 1979)

Witnesses, Attesting

An Indian of the age of 21 years or over and of testamentary capacity, who has any right, title, or interest in trust property, may dispose of such property by a will executed in writing and attested by two disinterested adult witnesses.

Estate of Emory Dennis Juneau, 7 IBIA 164 (June 29, 1979)

Applicable Departmental regnlations do not require that the attesting witness know the language of the testatrix; it is required that the witness merely know that she is acting as an attesting witness.

Estate of Fannie Newrobe Choate, 7 IBIA 171 (July 31, 1979)

Facts of the case justified a finding by the administrative law judge that there was a failure to prove will where testimony to show testamentary act was scanty and where purported will was undated and was marked "signed copy."

Estate of Cleveland Iron Shooter, 7 IBIA 212 (Sept. 12, 1979)

INDIAN TRIBES

CONSTITUTION, BYLAWS AND ORDINANCES

The Department is not bound by a tribal ordinance regulating trust property where such ordinance violates provisions of the tribal constitution and bylaws which the Secretary has sworn to uphold.

Administrative Appeal of Oglala Sioux Tribe v. Commissioner of Indian Affairs and Richard Tall (PRU-10542), 7 IBIA 188 (Sept. 5, 1979) 86 I.D. 425

JUDICIAL REVIEW

Where the holder of an oil and gas lease on the Outer Continental Shelf has filed a suit in a Federal district court to recover certain royalties paid under his lease, the Board of Land Appeals will affirm a decision of the Director, Geological Survey, holding in abeyance the lessee's request for a refund while the suit is pending.

Tenneco Oil Co., 41 IBLA 195 (June 22, 1979)

MILLSITES

DETERMININATION OF VALIDITY

Where a millsite is located in conjunction with certain mining claims which are found to be invalid, and the millsite is not being used for any purpose associated with mining, the mere presence of water on the millsite which could be used for mining or milling in the event such activities should transpire is not sufficient to support a finding that the millsite claim is valid.

United States v. Emmett C. Harder, 42 IBLA 206 (Aug. 22, 1979)

MINERAL LANDS

GENERALLY

The purpose of 30 U.S.C. § 38 (1976) whereby a person or association may establish a right to patent lands which said person or association has held and worked for a period equal to the statute of limitations is to obviate the necessity of proving formal compliance with requirements for locating a claim, but not to dispense with proof of discovery.

United States v. Leroy S. Johnson et al., 39 IBLA 337 (Feb. 28, 1979)

MINERAL RESERVATION

A bond filed by a mining claim owner, covering lands patented under the Stock-Raising Homestead Act of Dec. 29, 1916, as amended, 43 U.S.C. §§ 291-301 (1970), need only be set in an amount to cover damages to crops, improvements, and the value of the land for grazing purposes within the limits of the mining claim. The ad damnum of the bond does not have to be sufficient to cover damages caused by a disruption of the surface owner's entire grazing operation.

Where surface owners object to the amount of a bond, submitted to the Bureau of Land Management under sec. 9 of the Stock-Raising Homestead Act of Dec. 29, 1916, as amended, 43 U.S.C. § 299 (1970), as being inadequate in amount, request a hearing thereon, but fail to tender any evidence which would impel the conclusion that a hearing is likely to be productive and meaningful, the request for a hearing is properly denied.

Elmer Silvera et al., 42 IBLA 11 (July 25, 1979)

MINERAL LEASING ACT

GENERALLY

The Secretary may, in computing the fair market value of coal to be leased competitively under privately owned surface, assume a limited surface owner consent cost, based on losses and costs to the surface estate and operation and similar evaluations, regardless of

MINERAL LEASING ACT--Continued

GENERALLY--Continued

the actual price paid or the amount which a surface owner could otherwise demand for consent.

Assumption of a limited surface owner consent cost to be used in place of actual cost in the computation of fair market value of coal to be leased competitively is necessary to ensure receipt of fair market value by the public as required by 30 U.S.C. § 201(a) (1976).

In the exercise of his discretion to lease under the Mineral Leasing Act, the Secretary has authority to decline to issue a coal lease where surface owner consent costs prevent the public from realizing a fair return on the value of the coal.

Coal Leasing Program -- Relationship of the Cost of Surface Owner Consent to Receipt of Fair Market Value for Federally Owned Coal, M-36909 (Jan. 15, 1979)
86 I.D. 28

Where Bureau of Land Management terminates a sodium lease because lessee failed to submit justification for holding a lease in excess of the acreage limitation, the decision will be set aside upon submission or explanation of failure to provide written information, and the case will be remanded for the State Office to determine whether the information submitted on appeal justifies continued lease tenure.

Olin Corp., 39 IBLA 161 (Jan. 29, 1979)

Oil and gas leases of Indian lands entered into under the 1938 Mineral Leasing Act (25 U.S.C. §§ 396a-396f (1970)) are not subject to the taxation proviso contained in 25 U.S.C. § 398c (1970).

Tax Status of the Production of Oil and Gas from Jicarilla Apache Tribal Lands Under the 1938 Indian Mineral Leasing Act, M-36896 (Supp.) (Mar. 2, 1979)
86 I.D. 181

BLM may properly readjust a coal lease issued pursuant to the terms of sec. 7, Mineral Leasing Act, 30 U.S.C. § 207 (1970), within a reasonable time after expiration of its 20-year period with or without notice by BLM to the lessee prior to expiration of the 20-year period.

The failure of BLM to readjust a coal lease issued pursuant to the terms of sec. 7, Mineral Leasing Act, 30 U.S.C. § 207 (1970), prior to or immediately after expiration of its 20-year period does not constitute a waiver of BLM's right to readjust said lease.

BLM is not estopped to readjust a coal lease issued pursuant to the terms of sec. 7, Mineral Leasing Act, 30 U.S.C. § 207 (1970), by its failure to readjust said lease prior to or immediately after expiration of its 20-year period.

BLM's readjustment of a coal lease issued pursuant to the terms of sec. 7, Mineral Leasing Act, 30 U.S.C. § 207 (1970), after expiration of the 20-year lease term does not violate a lessee's rights under the fifth amendment of the United States Constitution.

BLM's readjustment of a coal lease issued pursuant to the terms of sec. 7, Mineral Leasing Act, 30 U.S.C. § 207 (1970), after expiration of the 20-year term does not violate the Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21(a) (1976), national policy in favor of coal development, and a certain cooperative agreement between the State of Wyoming and the Department of the Interior.

California Portland Cement Co., Rosebud Coal Sales Co., 40 IBLA 339 (May 10, 1979)

MINERAL LEASING ACT FOR ACQUIRED LANDS

LANDS SUBJECT TO

The Mineral Leasing Act for Acquired Lands does not exclude from oil and gas leasing those lands underlying the Missouri River within the boundaries of the Fort Berthold Indian Reservation as established by the Treaty of Fort Laramie (1851) and the Executive Order of Apr. 12, 1870, which were reacquired by the United States from the Indian tribes. The exclusion in the Act for submerged lands refers to submerged coastal lands, as set forth in 43 CFR 3101.2-1(g).

Impel Energy Corp., 42 IBLA 105 (Aug. 16, 1979)

MINERALS EXPLORATION

An application for permit to drill for oil and gas in a designated Potash Area is properly denied where the applicant fails to show that his application comes within either of the two exceptions to the policy in favor of potash development enunciated in an Order of the Secretary, dated Oct. 7, 1975, 40 FR 51486.

Belco Petroleum Corp., 42 IBLA 150 (Aug. 16, 1979)

MINES AND MINING

The Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a (1970), does not require the granting of permission for placer mining operations on land within a powersite withdrawal where such operations would probably interfere with other uses of the land.

United States v. Edward J. Connolly, Jr., Idaho Fish and Game Department (Intervenor), 40 IBLA 36 (Mar. 15, 1979)

MINING CLAIMS

GENERALLY

Where it is determined that a person or association, they and their grantors, have met the fundamental requirements of the possessory rights section of the mining laws, 30 U.S.C. § 38 (1976), i.e., where they have held and worked their claims in this instance for the qualifying period of 5 years under the Arizona statute of limitations covering actions to recover real property, they are entitled to a patent to those areas where there are no conflicting mining claims, regardless of the fact that the claims were improperly located as placer claims for perlite lode deposits.

United States v. Estate of Arthur C. W. Bowen (Deceased), and Superior Perlite Mines, Inc. (Contestees), Harborlite Corp. (Intervenor), 38 IBLA 390 (Jan. 8, 1979)

A petition for deferment of assessment work may only be granted pursuant to 43 CFR 3852.1, where "legal impediments" exist which affect the right of a mining claimant to enter upon the surface of a claim or group of claims. Pending litigation, which does not, in and of itself, preclude access to the mining claims does not constitute "legal impediments" within the ambit of the Act of June 21, 1949, 30 U.S.C. § 28b (1976), and a petition for deferment of assessment work will be denied.

A mining claimant petitioning for temporary deferment of annual assessment work is required by 43 CFR 3852.2(a) to file the petition in duplicate, and to attach a copy of notice to the public to one copy of

MINING CLAIMS--Continued

GENERALLY--Continued

the petition. The copy of the public notice must show on its face that it has been duly filed or recorded. Failure to meet this requirement will cause the petition to be denied.

Don Hesselgesser, 39 IBLA 75 (Jan. 24, 1979)

Designation of a river for potential addition to the national wild and scenic rivers system, pursuant to the Wild and Scenic Rivers Act of 1968, as amended, 16 U.S.C. § 1271 et seq. (1976), withdraws Federal lands constituting the bed or bank or within one-quarter mile of the bank of such river from all forms of appropriation under the mining laws, and on appeal the mining claimant bears the burden of showing by survey or other evidence that his claim is outside the withdrawn area.

Barry C. Binning, 39 IBLA 390 (Feb. 28, 1979)

Lands segregated on the public records by a proposed withdrawal posted Apr. 6, 1973, or a Recreational and Public Purposes Classification filed Nov. 13, 1956, were not available for the location of mining claims, and claims thereafter located are null and void ab initio.

"Contest." A decision declaring claims located on withdrawn lands to be null and void ab initio is not a "contest" and regulations under 43 CFR 4.451 et seq., relating to mining contests, have no application.

Delmer McLean et al., 40 IBLA 34 (Mar. 15, 1979)

Sec. 314 of the Federal Land Policy and Management Act of 1976 was enacted to establish a Federal recording system for mining claims to facilitate Federal land use planning and management. Failure to comply with the mandatory filing requirements constitutes abandonment of the claim and the land reverts to the status of public domain.

In the absence of a specific regulation or policy directive specifying the type of proof necessary for recordation, the Bureau of Land Management should liberally consider attempts by a mining claimant under sec. 314 of the Federal Land and Policy Management Act to record notice of a mining claim where proof of recording cannot be made and 30 U.S.C. § 38 (1976) is relied upon for holding the claim, and before rejecting a filing for such a claim, BLM should request further evidence from the claimant which it would consider satisfactory. Such evidence should include at a minimum the name the claim is and has been known by, the name and address of the claimant, an adequate description of the claim, the type of claim, the time of holding and working the claim to meet a State's statute of limitations and, if possible, the date of the origin of claimant's title and facts as to continuation of possession of the claim, and any other information available showing a chain of title to the claimant and bearing upon the possession and occupancy of the claim for mining purposes, and other information which the Bureau of Land Management deems essential to meet the purposes of the recordation provision.

Philip Sayer, 42 IBLA 296 (Aug. 27, 1979)

MINING CLAIMS--Continued

GENERALLY--Continued

Pursuant to 43 U.S.C. § 1712(e)(3) (1976), a wholly owned Government corporation may acquire and hold rights as a citizen under the Mining Law of 1872.

John R. Meadows, 43 IBLA 35 (Sept. 12, 1979)

It is a cardinal principle of mining law that mineralization that only warrants further prospecting or exploration in an effort to ascertain whether sufficient mineral might be found to justify mining development does not constitute a valuable mineral deposit.

United States v. Edward T. McHenry et al., 43 IBLA 122 (Sept. 26, 1979)

ABANDONMENT

Under 43 CFR 3833.2-1(b), the owner of unpatented mining claims located after Oct. 21, 1976, in the calendar year 1977, must file affidavits of assessment work or notices of intention to hold the mining claims prior to Dec. 31 of the following calendar year, 1978, or the claims will be conclusively deemed to have been abandoned under 43 CFR 3833.4(a).

Blackburn Enterprises, 41 IBLA 115 (June 11, 1979)

Where the owner of an unpatented mining claim located prior to Oct. 21, 1976, fails to file an affidavit of assessment work or notice of intention to hold the claim on or before Dec. 31 of the calendar year following the calendar year in which he recorded the claim in the BLM office, his claim is properly deemed conclusively to have been abandoned.

Charles and Pete Caress, 41 IBLA 302 (June 29, 1979)

Under the Federal Land Policy and Management Act of 1976, sec. 314, 43 U.S.C. § 1744 (1976), the owner of an unpatented mining claim located on Oct. 10, 1977, must file an affidavit of assessment work or a notice of intention to hold the mining claim prior to Dec. 31 of the following calendar year, 1978, or the claim will be conclusively deemed to have been abandoned.

Bruce Parke, 42 IBLA 18 (July 25, 1979)

The owner of an unpatented mining claim relocated before Oct. 21, 1976, has until Oct. 21, 1979, in which to record his notice of location with BLM. However, if he elects to record in 1977, he must file an affidavit of assessment work or a notice of intention to hold the mining claim prior to Dec. 31 of the following year, 1978, and each year thereafter, or the claim will be conclusively deemed to have been abandoned.

William L. Rucinski, 42 IBLA 56 (Aug. 1, 1979)

Under 43 CFR 3833.2-1(a), the owner of unpatented mining claims located before Oct. 21, 1976, in the calendar year 1978, and recorded with the Bureau of Land Management (BLM) in 1977, must file affidavits of assessment work or notices of intention to hold the mining claims prior to Dec. 31 of each calendar year after recording, or the claims will be conclusively deemed to have been abandoned under 43 CFR 3833.4(a).

Clair R. Caldwell et al., 42 IBLA 139 (Aug. 16, 1979)

MINING CLAIMS--Continued

ABANDONMENT--Continued

Under 43 CFR 3833.2-1, the owner of two unpatented mining claims, one located Sept. 16, 1976, and recorded with BLM May 3, 1977, and one located Feb. 1, 1977, and recorded with BLM Feb. 17, 1977, must have filed affidavits of assessment work or notices of intention to hold the mining claims for both claims prior to Dec. 31 of the calendar year, 1978, to prevent the claims from being conclusively deemed to have been abandoned under 43 CFR 3833.4(a).

Where, on appeal, a mining claimant alleges that he timely mailed the affidavits of assessment work to the proper BLM office but there is no evidence to indicate they were ever received, the claimant must bear the consequences of the loss and his inability to prove his allegation that they may have been received by the Bureau and subsequently lost.

Amanda Mining & Manufacturing Ass'n., 42 IBLA 144 (Aug. 16, 1979)

Under the Federal Land Policy and Management Act of 1976, $ 314, 43 U.S.C. $ 1744 (1976), the owner of unpatented mining claims located in 1977 must file an affidavit of assessment work or a notice of intention to hold the claim prior to Dec. 31 of the following calendar year, 1978, or the claim will be conclusively deemed to have been abandoned. Where an appellant asserts on appeal that he timely mailed proof of labor to the Bureau of Land Management, but the documents were not received by that office, the documents cannot be considered as filed with that office unless and until they are received by it.

John Newkirk et al., 42 IBLA 292 (Aug. 27, 1979)

James E. Yates, 42 IBLA 391 (Sept. 11, 1979)

Sec. 314 of the Federal Land Policy and Management Act of 1976 was enacted to establish a Federal recording system for mining claims to facilitate Federal land use planning and management. Failure to comply with the mandatory filing requirements constitutes abandonment of the claim and the land reverts to the status of public domain.

Philip Sayer, 42 IBLA 296 (Aug. 27, 1979)

Where the owner of an unpatented mining claim located prior to Oct. 21, 1976, fails to file an affidavit of assessment work or notice of intention to hold the claim on or before Dec. 31 of the calendar year following the calendar year in which he recorded the claim in the BLM office, his claim is properly deemed conclusively to have been abandoned and to be null and void.

A State law which reguires filing of proof of assessment work which requirement is more liberal than the recordation requirement of the Federal Land Policy and Management Act of 1976, $ 314a, 43 U.S.C. $ 1744 (1976), cannot override the more onerous requirements of the latter, since Article VI, Clause 2 of the Federal Constitution makes the Constitution, and laws and treaties made in conformity therewith, the supreme law of the land.

James V. Joyce, 42 IBLA 383 (Sept. 11, 1979)

MINING CLAIMS--Continued

ABANDONMENT--Continued

Under the Federal Land Policy and Management Act of 1976, sec. 314, 43 U.S.C. $ 1744 (1976), the owner of unpatented mining claims located in 1977 must file affidavits of assessment work or notices of intention to hold the claims prior to Dec. 31 of the following calendar year, 1978, or the claims will be conclusively deemed to have been abandoned, and may properly be declared void.

Ernest K. Iehmann and Associates, 43 IBLA 1 (Sept. 11, 1979)

Under 43 U.S.C. $ 1744(a) (1976), the owner of an unpatented mining claim located after Oct. 21, 1976, but in the calendar year 1976, must file an affidavit of assessment work or a notice of intention to hold the mining claim prior to Dec. 31 of the following calendar year, 1977, or the claim will be conclusively deemed to have been abandoned. Sec. 1744(a) does not conflict with 30 U.S.C. $ 28 (1976) which pertains to the year in which the first affidavit of assessment work must be recorded.

Charlie Carnal, Walter Peck, and Edward Borzansky, 43 IBLA 10 (Sept. 11, 1979)

Under 43 CFR 3833.2-1 the owner of unpatented mining claims located after Oct. 21, 1976, and recorded with the Bureau of Land Management in Nov. 1977, must have filed affidavits of assessment work or notices of intention to hold the mining claims prior to Dec. 31, 1978, to prevent the claims from being conclusively deemed to have been abandoned under 43 CFR 3833.4(a).

Where, on appeal, a mining claimant alleges that he timely mailed the affidavits of assessment work to the proper BLM office but there is no evidence to indicate they were ever received, the claimant must bear the consequences of the loss and his inability to prove his allegation that they may have been received by the Bureau and subsequently lost.

Roger Kuhn, 43 IBLA 182 (Sept. 28, 1979)

ASSESSMENT WORK

A petition for deferment of assessment work may only be granted pursuant to 43 CFR 3852.1, where "legal impediments" exist which affect the right of a mining claimant to enter upon the surface of a claim or group of claims. Pending litigation, which does not, in and of itself, preclude access to the mining claims does not constitute "legal impediments" within the ambit of the Act of June 21, 1949, 30 U.S.C. $ 28b (1976), and a petition for deferment of assessment work will be denied.

A mining claimant petitioning for temporary deferment of annual assessment work is reguired by 43 CFR 3852.2(a) to file the petition in duplicate, and to attach a copy of notice to the public to one copy of the petition. The copy of the public notice must show on its face that it has been duly filed or recorded. Failure to meet this requirement will cause the petition to be denied.

Don Hesselgesser, 39 IBLA 75 (Jan. 24, 1979)

MINING CLAIMS--Continned

ASSESSMENT WORK--Continued

Under sec. 2 of the Act of June 21, 1949, 30 U.S.C. $ 28c (1976), annual assessment work for mining claims may only be deferred for 2 years, and a petition for deferment beyond the authorized 2-year period is properly denied.

John S. Herr, 40 IBLA 158 (Mar. 30, 1979)

Under the Federal Land Policy and Management Act of 1976, 43 U.S.C. $ 1744(a)(2) (1976), if an unpatented mining claim located after Oct. 21, 1976, is not supported annually by either an affidavit of assessment work or notice of intention to hold, the claim will be conclusively deemed abandoned and void, despite appellant's statement there was no intent to abandon and that failure to file was an oversight.

Nuclear Power and Energy Co. and B-2, Inc., 41 IBLA 142 (June 14, 1979)

Where the owner of an unpatented mining claim located prior to Oct. 21, 1976, fails to file an affidavit of assessment work or notice of intention to hold the claim on or before Dec. 31 of the calendar year following the calendar year in which he recorded the claim in the BLM office, his claim is properly deemed conclusively to have been abandoned.

Charles and Pete Caress, 41 IBLA 302 (June 29, 1979)

A provision of State law, relating to assessment work on mining claims, which is more liberal than the requirements of Federal law, cannot override such Federal law. Article IV, $ 3, cl. 2, of the Federal Constitution vests in the Congress authority to promulgate appropriate laws governing the public lands and other property of the United States.

Under the Federal Land Policy and Management Act of 1976, sec. 314, 43 U.S.C. $ 1744 (1976), the owner of an unpatented mining claim located on Oct. 10, 1977, must file an affidavit of assessment work or a notice of intention to hold the mining claim prior to Dec. 31 of the following calendar year, 1978, or the claim will be conclusively deemed to have been abandoned.

Bruce Parke, 42 IBLA 18 (July 25, 1979)

Under the Federal Land Policy and Management Act of 1976, $ 314, 43 U.S.C. $ 1744 (1976), the owner of unpatented mining claims located in 1977 must file an affidavit of assessment work or a notice of intention to hold the claim prior to Dec. 31 of the following calendar year, 1978, or the claim will be conclusively deemed to have been abandoned. Where an appellant asserts on appeal that he timely mailed proof of labor to the Bureau of Land Management, but the documents were not received by that office, the documents cannot be considered as filed with that office unless and until they are received by it.

John Newkirk et al., 42 IBLA 292 (Aug. 27, 1979)

James E. Yates, 42 IBLA 391 (Sept. 11, 1979)

Where the owner of an unpatented mining claim located prior to Oct. 21, 1976, fails to file an affidavit of assessment work or notice of intention to hold the

MINING CLAIMS--Continued

ASSESSMENT WORK--Continued

claim on or before Dec. 31 of the calendar year following the calendar year in which he recorded the claim in the BLM office, his claim is properly deemed conclusively to have been abandoned and to be null and void.

A State law which requires filing of proof of assessment work which requirement is more liberal than the recordation requirement of the Federal Land Policy and Management Act of 1976, $ 314a, 43 U.S.C. $ 1744 (1976), cannot override the more onerous requirements of the latter, since Article VI, Clause 2 of the Federal Constitution makes the Constitution, and laws and treaties made in conformity therewith, the supreme law of the land.

James V. Joyce, 42 IBLA 383 (Sept. 11, 1979)

Under the Federal Land Policy and Management Act of 1976, sec. 314, 43 U.S.C. $ 1744 (1976), the owner of unpatented mining claims located in 1977 must file affidavits of assessment work or notices of intention to hold the claims prior to Dec. 31 of the following calendar year, 1978, or the claims will be conclusively deemed to have been abandoned, and may properly be declared void.

Ernest K. Lehmann and Associates, 43 IBLA 1 (Sept. 11, 1979)

For the purposes of filing affidavits of assessment work or notices of intention to hold a mining claim, the date of location of the claim is the date as defined in 43 CFR 3833.0-5(h).

Under 43 U.S.C. $ 1744(a) (1976), the owner of an unpatented mining claim located after Oct. 21, 1976, but in the calendar year 1976, must file an affidavit of assessment work or a notice of intention to hold the mining claim prior to Dec. 31 of the following calendar year, 1977, or the claim will be conclusively deemed to have been abandoned. Sec. 1744(a) does not conflict with 30 U.S.C. $ 28 (1976) which pertains to the year in which the first affidavit of assessment work must be recorded.

Charlie Carnal, Walter Peck, and Edward Borzansky, 43 IBLA 10 (Sept. 11, 1979)

COMMON VARIETIES OF MINERALS

Generally

Where a mining claimant attempts to establish his location of a mining claim containing common variety minerals by invoking the terms of 30 U.S.C. $ 38 (1976) and fails to complete the statutory period for holding and working his claim prior to July 23, 1955, BLM may properly hold such claim to be null and void.

Charles House, Mrs. Leonard Skinner, 42 IBLA 364 (Sept. 11, 1979)

CONTESTS

When the Government contests a mining claim on a charge of no discovery, it bears the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made.

MINING CLAIMS--Continued

CONTESTS--Continued

Where a Government mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery, a prima facie case of invalidity has been established.

Mineral values on a claim may properly be tested by taking dry samples and washing them down to a concentrate. The absence of adequate water to run a dredging operation at the claim due to drought conditions is immaterial, as it is not necessary to run a dredge in order to sample the mineral values there.

It is incumbent upon a mining claimant to keep his discovery points available for inspection by Government mineral examiners. Where he does not, he assumes the risk that the mineral examiner will not be able to verify the discovery of the alleged mineral deposit, and his unsupported argument that the samples taken by the examiner are not representative will be rejected.

Unless and until the lands within a mining claim are patented to the claimant, they are Federal lands, and the Government retains the right to enter the lands at any time without search warrants, including the right to remove material samples from the claim in order to determine whether the land is mineral in character and whether a valuable deposit of a locatable mineral has been discovered by the claimant.

As the Government is required to adjudicate mining claims contests under its own rules and regulations, a customary review of the validity of a claim by a district examining committee is immaterial to the adjudication of the actual validity of the claim. Local customs relating to validity of a claim may only add to the Federal mining law; such customs cannot replace Federal requirements for adjudicating the validity of claims.

United States v. Russ Knecht, 39 IBLA 8 (Jan. 8, 1979)

Failure to file a timely answer to a mining claim contest complaint will result in the charges in the complaint being taken as admitted and the case being decided without a hearing. Where contestees deny the allegations in the complaint only as to 4 claims but not as to 15 other claims addressed in the complaint, the complaint will be taken as admitted as to the 15 claims not addressed in the answer to the complaint.

Where contestees in a mining claim contest file a timely answer to the contest complaint, this answer is efficacious as to any other contestees who are members of his family if it appears on the face of the answer that they wish to retain their interests, if any, in the claims, as the contestees who answered may be regarded as having done so on their family members' behalf. In these circumstances, these other contestees are properly regarded as having answered the complaint, absent any manifestation of a contrary intent.

Where a contestee makes a timely response to a Government complaint in a mining contest which is sufficient to raise a justiciable controversy, the allegations then cannot be taken as admitted and the mining claim(s) cannot be declared null and void without a hearing.

United States v. Jerry Prock et al., 39 IBLA 148 (Jan. 29, 1979)

A Government contest against a mining claim does not lose its public character and become a private contest because the land involved may ultimately be conveyed to a private entity in a land exchange, nor does that possibility warrant the application of any different standard for determining whether there has been a discovery

MINING CLAIMS--Continued

CONTESTS--Continued

of a valuable mineral deposit within the claim, or a different burden of proof.

United States v. George R. Edeline et al., 39 IBLA 236 (Feb. 13, 1979)

Failure to file a timely answer to a mining claim contest complaint will result in the charges in the complaint being taken as admitted and the case being decided without a hearing.

United States v. James Hawkeswood et al., 41 IBLA 245 (June 27, 1979)

United States v. Edna Horstmeier, 42 IBLA 33 (July 26, 1979)

When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case. Where a Government mineral examiner testifies that he has examined a claim and found the quantity of minerals insufficient to support a finding of discovery, a prima facie case of invalidity has been established and the burden shifts to the claimants to show by a preponderance of the evidence that a discovery has been made. Government mineral examiners are not required to perform discovery work for a claimant or to explore beyond a claimant's workings.

The entire evidentiary record in a mining contest is considered and if evidence presented by a contestee is damaging to the contestee's case it may be used against the contestee regardless of any deficiencies in the Government's presentation. Therefore, regardless of whether the Government established a prima facie case of lack of discovery, if the entire record establishes that a discovery was not made on a claim it is properly declared null and void.

It was proper to deny mining claimants' request to redrill on mining claims after the land was withdrawn from mining where the work would be an effort to make a discovery of a valuable mineral deposit within the claim rather than simply a confirmation or corroboration of a discovery prior to the withdrawal.

United States v. William Lavon Chappell et al., 42 IBLA 74 (Aug. 13, 1979)

When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made.

United States v. Emmett C. Harder, 42 IBLA 206 (Aug. 22, 1979)

United States v. Edward T. McHenry et al., 43 IBLA 122 (Sept. 26, 1979)

In a mining claim contest where a contestee is of the opinion that the Government did not make a prima facie case of no discovery, he may move to have the case dismissed at the conclusion of the Government's case and then rest. The contest complaint could be dismissed if the administrative law judge rules that no prima facie case had been made of lack of discovery and there is no other evidence in the record to support the charges in

MINING CLAIMS--Continued

CONTESTS--Continued

the complaint. But if the contestee goes forward after making such a motion to dismiss and presents his evidence, that evidence must be considered as part of the entire record and its probative value will be weighed. Thus, even if the Government has failed to make a prima facie case, evidence presented by the contestee which supports the Government's contest charges may be used against the contestee, regardless of the defects in the Government's case.

A sufficient prima facie case by the Government does not require positive proof that there has been no discovery made or that the mining claim is nonmineral in character. Upon the Government's presentation of a prima facie case, the burden shifts to the claimant to prove by a preponderance of the evidence that he indeed has a discovery of a valuable mineral deposit within the limits of the claim.

A second hearing of a Government mining contest will not be afforded where a claimant was given notice and an opportunity to appear at a hearing, where he was actually present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result. A petition to reopen a hearing of a Government mining contest will be denied when the contestee offers no valid justification for the neglect to offer evidence which was or could have been available at the original hearing. A further hearing will not be ordered merely to afford a claimant an additional opportunity to explore and make a discovery.

United States v. Andy Syndbad, 42 IBLA 313 (Aug. 29, 1979)

When the Government contests a mining claim on a charge of lack of discovery, the Government has the burden of proving a prima facie case; the burden then shifts to the mining claimant to prove by a preponderance of the evidence that discovery exists.

United States v. Ted G. Ax, 43 IBLA 146 (Sept. 28, 1979)

DETERMINATION OF VALIDITY

A mining claim located on land which is not subject to mineral entry at the time of location is null and void from its inception.

W. Ted Hackett, 39 IBLA 28 (Jan. 11, 1979)

No discovery of a valuable mineral deposit is demonstrated where the amounts of mineral yielded by a claim are so small that mining could never be expected to produce an economic return in any way commensurate with the labor and cost involved in production.

United States v. Evelyn M. Kiggins et al., 39 IBLA 88 (Jan. 26, 1979)

There has been no discovery of a valuable mineral deposit within a lode mining claim unless there has been physically exposed within the limits of the claim the vein or lode-bearing mineral of such quality and quantity as to justify the expenditure of money for the development of a mine and the extraction of the mineral.

In determining whether a claim has been validated by a discovery of a valuable mineral deposit, the Board of Land Appeals adheres to the longstanding distinction

DETERMINATION OF VALIDITY--Continued

between evidence sufficient to warrant only further exploration to find a valuable mineral deposit and that which suffices to prove a discovery of a valuable mineral deposit.

In evaluating a mineral deposit within a mining claim geologic inference may be used where the deposit has been adequately physically exposed. However, geologic inference cannot be used as a substitute for evidence which sufficiently shows the existence of an ore body or bodies necessary to warrant a prudent man to develop a valuable mine; geologic inference may not be used to infer mineralization throughout a vein area where the evidence shows a few spots of high mineralization, but the mineralized areas are spotty and discontinuous.

United States v. George R. Edeline et al., 39 IBLA 236 (Feb. 13, 1979)

Lands which were subject to an oil and gas lease offer on Sept. 20, 1951, were not open to mineral location, and mining claims located on such lands on this date are properly declared null and void in the absence of compliance with the redemption provisions of the Act of Aug. 12, 1953, and the Multiple Mineral Development Act, requiring filing of an amended notice of location prior to Dec. 10, 1953, in the place and manner in which the original notice was of record.

Dorothy Smith, 39 IBLA 306 (Feb. 23, 1979)

A mining claim located on land previously withdrawn from appropriation under the mining laws is null and void ab initio.

Gerald Byron Bannon, 40 IBLA 162 (Mar. 30, 1979)

Tilden Holloway, Roland Wright, 43 IBLA 134 (Sept. 28, 1979)

Under sec. 314(b) of the Federal Land Policy and Management Act of 1976, unless the required copy of the official record of location is filed in the proper BLM office within 90 days from the date of location, a mining claim located after Oct. 21, 1976, is void and any later filing of the notice is invalid.

Lawrence A. Landry, 40 IBLA 212 (Apr. 10, 1979)

Under sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), and 43 CFR 3833.1-2, the owner of a mining claim located after Oct. 21, 1976, must file a notice of recordation of the claim with the proper Bureau of Land Management office within 90 days of location of the claim. A notice must be received and date stamped in the BLM office within the 90-day period to be timely filed.

M. J. Reeves, 41 IBLA 92 (June 4, 1979)

For a mining claim to be valid there must be a discovery of a valuable mineral deposit within the limits of the claim. There has been a discovery where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

Where the land on which the mining claim is located is subsequently withdrawn, the validity of the claim must be determined as of the date of the withdrawal and

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

through the date of the hearing. If there was no discovery as of the date of the withdrawal, the land would not be excepted from the effect of the withdrawal and the claim could not thereafter become valid even though the requirement of discovery was satisfied at a later date.

United States v. William Lavon Chappell et al., 42 IBLA 74 (Aug. 13, 1979)

Where a mining claimant attempts to establish his location of a mining claim containing common variety minerals by invoking the terms of 30 U.S.C. § 38 (1976) and fails to complete the statutory period for holding and working his claim prior to July 23, 1955, BLM may properly hold such claim to be null and void.

Charles House, Mrs. Leonard Skinner, 42 IBLA 364 (Sept. 11, 1979)

DISCOVERY

Generally

To determine whether there has been a discovery of a valuable mineral deposit within a lode claim there must be exposed within the limits of the claim a vein or lode bearing mineral of such quality and quantity as would induce a prudent man to expend his time and means with the expectation of developing a valuable mine.

Evidence of mineralization which may justify further exploration, but not development of a mine, does not establish the discovery of a valuable mineral deposit.

No discovery of a valuable mineral deposit is demonstrated where the amounts of mineral yielded by a claim are so small that mining could never be expected to produce an economic return in any way commensurate with the labor and cost involved in production.

United States v. Evelyn M. Kiggins et al., 39 IBLA 88 (Jan. 26, 1979)

There has been no discovery of a valuable mineral deposit within a lode mining claim unless there has been physically exposed within the limits of the claim the vein or lode-bearing mineral of such quality and quantity as to justify the expenditure of money for the development of a mine and the extraction of the mineral.

In determining whether a claim has been validated by a discovery of a valuable mineral deposit, the Board of Land Appeals adheres to the longstanding distinction between evidence sufficient to warrant only further exploration to find a valuable mineral deposit and that which suffices to prove a discovery of a valuable mineral deposit.

In evaluating a mineral deposit within a mining claim geologic inference may be used where the deposit has been adequately physically exposed. However, geologic inference cannot be used as a substitute for evidence which sufficiently shows the existence of an ore body or bodies necessary to warrant a prudent man to develop a valuable mine; geologic inference may not be used to infer mineralization throughout a vein area where the evidence shows a few spots of high mineralization, but the mineralized areas are spotty and discontinuous.

United States v. George R. Edeline et al., 39 IBLA 236 (Feb. 13, 1979)

MINING CLAIMS--Continued

DISCOVERY--Continued

Generally--Continued

The purpose of 30 U.S.C. § 38 (1976) whereby a person or association may establish a right to patent lands which said person or association has held and worked for a period equal to the statute of limitations is to obviate the necessity of proving formal compliance with requirements for locating a claim, but not to dispense with proof of discovery.

United States v. Leroy S. Johnson et al., 39 IBLA 337 (Feb. 28, 1979)

A placer mining claim is valid only where there has been discovered within the limits of the claim a valuable mineral deposit.

After the Government, through expert testimony of its mineral examiner, has made a prima facie showing that no discovery exists, the burden of going forward with a preponderance of evidence to the contrary falls upon contestees.

United States v. Cecil F. Ross, Jr., 40 IBLA 169 (Apr. 3, 1979)

The Government has established a prima facie case of a lack of discovery, thus shifting the burden of going forward, when an expert witness testified that he has examined the claim and has found the mineral value insufficient to support a finding of discovery.

Mineralization that only warrants further prospecting or exploration in an effort to ascertain whether sufficient mineralization might be found to justify mining or development does not constitute a valuable mineral deposit, i.e., a valuable mineral deposit has not been found simply because the facts might warrant a search for such a deposit.

To establish a discovery of a valuable mineral deposit, a claimant must show more than that a prudent man would explore the claim further. The claimant must show that a valuable mineral deposit has been physically exposed within the limits of the claim.

United States v. Tempest Mining Co., 40 IBLA 297 (Apr. 27, 1979)

A Government mineral examiner in evaluating a mining claim is under no duty to undertake discovery work or to explore beyond the current workings of a claim and it is incumbent upon the mining claimant to keep discovery points available for inspection by a Government mineral examiner.

Mineralization that only warrants further prospecting or exploration in an effort to ascertain whether sufficient mineralization might be found to justify mining or development does not constitute a valuable mineral deposit.

United States v. Dan S. Russell, 40 IBLA 309 (Apr. 30, 1979)

For a mining claim to be valid there must be a discovery of a valuable mineral deposit within the limits of the claim. There has been a discovery where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor

MINING CLAIMS--Continued

DISCOVERY--Continued

Generally--Continued

and means, with a reasonable prospect of success in developing a valuable mine.

The "prndent man test" is met only where it appears that the mineralization on the claim has been physically exposed and is valuable enough to yield a fair market value in excess of the costs of extraction, removal, and sale. Evidence of mineralization which would justify further exploration, but not development, does not suffice to meet the discovery requirement.

Where the land on which the mining claim is located is subsequently withdrawn, the validity of the claim must be determined as of the date of the withdrawal and through the date of the hearing. If there was no discovery as of the date of the withdrawal, the land would not be excepted from the effect of the withdrawal and the claim could not thereafter become valid even though the requirement of discovery was satisfied at a later date.

United States v. William Lavon Chappell et al., 42 IBLA 74 (Aug. 13, 1979)

Discovery of a valuable mineral deposit has been made where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made.

Where a Government mineral examiner testifies that he has examined a claim and found the mineral valnes insufficient to support a finding of discovery, a prima facie case of validity has been established. Government mineral examiners are not required to perform discovery work for claimants or to explore beyond a claimant's workings.

United States v. Emmett C. Harder, 42 IBLA 206 (Aug. 22, 1979)

Discovery of a valuable mineral deposit has been made where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

Where a Government mineral examiner testifies that he has examined a claim and found the mineral value insufficient to support a finding of discovery, a prima facie case of invalidity has been established. Government mineral examiners are not required to perform discovery work for claimants nor to explore beyond a claimant's workings.

When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made.

Discovery of gold sufficient to support a mining claim must be made on the claim itself, notwithstanding discovery of gold on nearby land which might persuade a reasonable prospector to continue his search for a valuable mineral deposit on the claim.

United States v. Edward T. McHenry et al., 43 IBLA 122 (Sept. 26, 1979)

A discovery of valuable mineral exists where the claim contains mineralization of sufficient quality and quantity to justify further expenditure of labor and means, with a reasonable prospect of success in developing a valuable mine.

When the Government contests a mining claim on a charge of lack of discovery, the Government has the burden of proving a prima facie case; the burden then shifts to the mining claimant to prove by a preponderance of the evidence that discovery exists.

Minute amounts of mineralization may justify further exploration without establishing discovery.

United States v. Ted G. Ax, 43 IBLA 146 (Sept. 28, 1979)

Geologic Inference

In evaluating a mineral deposit within a mining claim geologic inference may be used where the deposit has been adequately physically exposed. However, geologic inference cannot be used as a substitute for evidence which sufficiently shows the existence of an ore body or bodies necessary to warrant a prudent man to develop a valuable mine; geologic inference may not be used to infer mineralization throughout a vein area where the evidence shows a few spots of high mineralization, but the mineralized areas are spotty and discontinnons.

United States v. George R. Edeline et al., 39 IBLA 236 (Feb. 13, 1979)

HEARINGS

As the Government is required to adjudicate mining claims contests under its own rules and regulations, a customary review of the validity of a claim by a district examining committee is immaterial to the adjudication of the actual validity of the claim. Local customs relating to validity of a claim may only add to the Federal mining law; such customs cannot replace Federal requirements for adjudicating the validity of claims.

United States v. Russ Knecht, 39 IBLA 8 (Jan. 8, 1979)

The Government has established a prima facie case of a lack of discovery, thus shifting the burden of going forward, when an expert witness testified that he has examined the claim and has found the mineral value insufficient to support a finding of discovery.

United States v. Tempest Mining Co., 40 IBLA 297 (Apr. 27, 1979)

Two mining claims, located at a time when the land is withdrawn from mineral entry, may be properly declared null and void ab initio without a hearing. Such a result obtains despite reference to a location notice prior to the withdrawal where appellants do not make a showing of snfficient specific facts upon which to predicate a hearing, including which of the claims the previous lccation relates to, the boundaries thereof,

MINING CLAIMS--Continued

HEARINGS--Continued

whether the previous location was for a locatable mineral under a withdrawal order then in force, and the name of the previous locator.

The Heirs of M. K. Harris, 42 IBLA 44 (July 3, 1979)

It was proper to deny mining claimants' request to redrill on mining claims after the land was withdrawn from mining where the work would be an effort to make a discovery of a valuable mineral deposit within the claim rather than simply a confirmation or corroboration of a discovery prior to the withdrawal.

United States v. William Lavon Chappell et al., 42 IBLA 74 (Aug. 13, 1979)

A second hearing will not be afforded where a mining claimant had notice of and appeared at the first hearing and no evidence has been submitted suggesting another hearing would produce a different result.

Failure to obtain counsel at a hearing into the validity of a mining claim will afford the mining claimant no greater rights on appeal than if he had obtained counsel.

United States v. Howard D. Long, Dolores M. Killion, 43 IBLA 150 (Sept. 28, 1979)

LANDS SUBJECT TO

A mining claim located on land at a time when the land is segregated from mining location by a State selection application is properly declared null and void ab initio.

A mining claim located on land which is not subject to mineral entry at the time of location is null and void from its inception.

W. Ted Hackett, 39 IBLA 28 (Jan. 11, 1979)

Land which has been patented without a reservation of minerals to the United States or which otherwise has been removed from the operation of the United States mining laws is not available for the location of mining claims. Mining claims located on such land after it is so removed are null and void ab initio. Attempts to record such claims under 43 U.S.C.A. § 1744 (West Supp. 1978) are properly rejected.

Baron Mining Corp., 39 IBLA 234 (Feb. 12, 1979)

Lands which were subject to an oil and gas lease offer on Sept. 20, 1951, were not open to mineral location, and mining claims located on such lands on this date are properly declared null and void in the absence of compliance with the redemption provisions of the Act of Aug. 12, 1953, and the Multiple Mineral Development Act, requiring filing of an amended notice of location prior to Dec. 10, 1953, in the place and manner in which the original notice was of record.

Dorothy Smith, 39 IBLA 306 (Feb. 23, 1979)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

Portions of mining claims located on lands within a withdrawal and not open to mineral entry are properly declared null and void ab initio.

Barry C. Binning, 39 IBLA 390 (Feb. 28, 1979)

A mining claim located on lands not then in Federal ownership is null and void ab initio.

Junior L. Dennis, 40 IBLA 12 (Mar. 9, 1979)

Lands segregated on the public records by a proposed withdrawal posted Apr. 6, 1973, or a Recreational and Public Purposes Classification filed Nov. 13, 1956, were not available for the location of mining claims, and claims thereafter located are null and void ab initio.

Mining claims purportedly located on land not available for such location confer no property right upon the locator, and may be declared null and void ab initio without a hearing under 5 U.S.C. § 554 et seq. (1976).

The notation on public records on Apr. 6, 1973, of an application for withdrawal, even though the application did not contain a reference to authority for the withdrawal, as required in 43 CFR 2351.2(b) (1972), was sufficient to temporarily segregate the land under secs. 2091.2-5 (1972) and 2351.3 (1972) from subsequent inclusion in a mining location.

Delmer McLean et al., 40 IBLA 34 (Mar. 15, 1979)

A mining claim located on land previously withdrawn from appropriation under the mining laws is null and void ab initio.

Gerald Byron Bannon, 40 IBLA 162 (Mar. 30, 1979)

Tilden Holloway, Roland Wright, 43 IBLA 134 (Sept. 28, 1979)

Land which has been patented without a reservation of minerals to the United States is not available for the location of mining claims, and mining claims located on such land after it is so patented are null and void ab initio.

John F. Drobnick, Dorcas M. Drobnick, 41 IBLA 164 (June 18, 1979)

Cole V. Mullen, 43 IBLA 102 (Sept. 24, 1979)

Two mining claims, located at a time when the land is withdrawn from mineral entry, may be properly declared null and void ab initio without a hearing. Such a result obtains despite reference to a location notice prior to the withdrawal where appellants do not make a showing of sufficient specific facts upon which to predicate a hearing, including which of the claims the previous location relates to, the boundaries thereof, whether the previous location was for a locatable mineral under a withdrawal order then in force, and the name of the previous locator.

The Heirs of M. K. Harris, 42 IBLA 44 (July 3, 1979)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

Prior to passage of the Multiple Mineral Development Act, 30 U.S.C. $$ 521-31 (1976), a prima facie valid mineral lease, or application therefor, though void and ineffectual to vest any rights to minerals subject to the mining laws in the lessee segregated the land from the operation of the mining laws and prevented the initiation of rights under the mining laws by another person until it had been set aside and removed from the records of the land office.

Charles House, Mrs. Leonard Skinner, 42 IBLA 364 (Sept. 11, 1979)

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of a State's application to select lands segregates these lands from all subsequent appropriation, including locations under the mining laws.

A mining claim located on land which was then segregated and closed to mineral entry is properly declared null and void ab initio.

Joe D. Denson, 43 IBLA 136 (Sept. 28, 1979)

LOCATABILITY OF MINERAL

Generally.

Water is not a locatable mineral and sales thereof cannot be considered in determining whether there has been a valuable discovery.

United States v. Ted G. Ax, 43 IBLA 146 (Sept. 28, 1979)

LOCATION

Where it is determined that a person or association, they and their grantors, have met the fundamental requirements of the possessory rights section of the mining laws, 30 U.S.C. $ 38 (1976), i.e., where they have held and worked their claims in this instance for the qualifying period of 5 years under the Arizona statute of limitations covering actions to recover real property, they are entitled to a patent to those areas where there are no conflicting mining claims, regardless of the fact that the claims were improperly located as placer claims for perlite lode deposits.

United States v. Estate of Arthur C. W. Bowen (Deceased), and Superior Perlite Mines, Inc. (Contestees), Harborlite Corp. (Intervenor), 38 IBLA 390 (Jan. 8, 1979)

A mining claim located on land which is not subject to mineral entry at the time of location is null and void from its inception.

W. Ted Hackett, 39 IBLA 28 (Jan. 11, 1979)

A mining claim located on land which is not subject to mineral entry at the time of location is null and void from its inception and confers no rights on the locator.

W. R. and Margaret W. Collier, 39 IBLA 81 (Jan. 24, 1979)

MINING CLAIMS--Continued

LOCATION--Continued

The purpose of 30 U.S.C. $ 38 (1976) whereby a person or association may establish a right to patent lands which said person or association has held and worked for a period equal to the statute of limitations is to obviate the necessity of proving formal compliance with requirements for locating a claim, but not to dispense with proof of discovery.

The primary rule which the courts apply in construing and interpreting a conveyance where the location of the boundary lines is uncertain by reason of inconsistent or conflicting descriptive calls in the conveyance is that the intention of the parties controls and is to be followed. Where the calls for the location of boundaries to land are inconsistent, calls to monuments, natural or artificial, are of paramount importance and will prevail over all other calls inconsistent therewith. Calls to boundaries are of secondary importance, and courses and distances must be altered if, as given, they will not reach the designated boundary. Calls of course take precedence over distances, so that where it is necessary to either change direction to reach a boundary or else reduce or extend the prescribed distance, the distance must yield to the course. The recital of quantity or area of land conveyed or retained will be least influential.

United States v. Leroy S. Johnson et al., 39 IBLA 337 (Feb. 28, 1979)

Designation of a river for potential addition to the national wild and scenic rivers system, pursuant to the Wild and Scenic Rivers Act of 1968, as amended, 16 U.S.C. $ 1271 et seq. (1976), withdraws Federal lands constituting the bed or bank or within one-quarter mile of the bank of such river from all forms of appropriation under the mining laws, and on appeal the mining claimant bears the burden of showing by survey or other evidence that his claim is outside the withdrawn area.

Barry C. Binning, 39 IBLA 390 (Feb. 28, 1979)

Prior to passage of the Multiple Mineral Development Act, 30 U.S.C. $$ 521-31 (1976), a prima facie valid mineral lease, or application therefor, though void and ineffectual to vest any rights to minerals subject to the mining laws in the lessee segregated the land from the operation of the mining laws and prevented the initiation of rights under the mining laws by another person until it had been set aside and removed from the records of the land office.

Where a mining claimant attempts to establish his location of a mining claim containing common variety minerals by invoking the terms of 30 U.S.C. $ 38 (1976) and fails to complete the statutory period for holding and working his claim prior to July 23, 1955, BLM may properly hold such claim to be null and void.

Charles House, Mrs. Leonard Skinner, 42 IBLA 364 (Sept. 11, 1979)

For the purposes of filing affidavits of assessment work or notices of intention to hold a mining claim, the date of location of the claim is the date as defined in 43 CFR 3833.0-5(b).

Charlie Carnal, Walter Peck, and Edward Borzansky, 43 IBLA 10 (Sept. 11, 1979)

MINING CLAIMS--Continued

LODE CLAIMS

"Lode" and "placer." A placer mining claim has been defined as ground within defined boundaries which contain mineral in its earth, sand, or gravel; ground that includes valuable deposits not in place, that is, not fixed in rock, but which are in a loose state, and may in most cases be collected by washing or amalgamation without milling. Whereas, a lode or vein has been defined as any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock; a body of mineral or mineral bearing rock within defined boundaries.

When mining claims have been located as placer claims for perlite which lies in a "blanket" or "pancake" in an almost horizontal plane and in its original state is encased between two different types of rock, where in places, the upper rock or layer has been eroded away leaving the perlite exposed at the surface and in other places on the claims the upper layer is still present, and the mining of the perlite is characterized as essentially a hard rock operation, and when it is first extracted from the ground and then processed or, in effect, milled to produce a marketable product, the perlite is properly classified as a lode deposit which will not sustain a placer location.

United States v. Estate of Arthur C. W. Bowen (Deceased), and Superior Perlite Mines, Inc. (Contestees), Harborlite Corp. (Intervenor), 38 IBLA 390 (Jan. 8, 1979)

To determine whether there has been a discovery of a valuable mineral deposit within a lode claim there must be exposed within the limits of the claim a vein or lode bearing mineral of such quality and quantity as would induce a prudent man to expend his time and means with the expectation of developing a valuable mine.

United States v. Evelyn M. Kiggins et al., 39 IBLA 88 (Jan. 26, 1979)

MILLSITES

Where the proprietor of a lode mining claim seeks to obtain patent for a millsite in connection with his lode claim, the millsite claim is properly declared invalid if it is unsupported by any use or occupation of the claimed land for mining or milling purposes and does not contain a quartz mill or reduction works.

A millsite claim located under the "quartz mill or reduction works" provision of 30 U.S.C. § 42 (1976) is properly rejected where no quartz mill or reduction works has been located on the claimed lands and no construction appears to be in progress.

A millsite claim must be declared invalid where the land upon which it is located is mineral in character.

United States v. Silver Chief Mining Co., Inc., 40 IBLA 244 (Apr. 16, 1979)

PATENT

The Secretary of the Interior is not authorized to issue a patent to a mining claim until the requirements of the law have been met.

United States v. Evelyn M. Kiggins et al., 39 IBLA 88 (Jan. 26, 1979)

MINING CLAIMS--Continued

PATENT--Continued

The regulations of this Department have the force and effect of law, and are binding upon the Secretary and those who exercise his delegated authority. Where a patent application regulation requires "full, true, and complete abstracts," and the surface of the mining claim has not been patented, the processing of patent applications accompanied only by limited abstracts is properly suspended, pending compliance with the regulation. Where, however, the surface of the mining claim has been patented, e.g., under the Stock-Raising Homestead Act, 43 U.S.C. §§ 291-300 (1970), the abstract generally need only reflect transactions affecting the mineral estate. A certificate of title is acceptable in lieu of an abstract in either situation.

Kerr-McGee Nuclear Corp. et al., 41 IBLA 197 (June 22, 1979)

Where a mining claimant attempts to establish his location of a mining claim containing common variety minerals by invoking the terms of 30 U.S.C. § 38 (1976) and fails to complete the statutory period for holding and working his claim prior to July 23, 1955, BLM may properly hold such claim to be null and void.

Charles House, Mrs. Leonard Skinner, 42 IBLA 364 (Sept. 11, 1979)

A party filing notice of alleged adverse mining claims with BLM is properly advised that he is required within 30 days of such filing to commence proceedings in a court of competent jurisdiction to determine the question of right of possession to the claims as between him and his rival claimant. During the pendency of this action, patent proceedings will be stayed.

BLM's dismissal of a protest against the issuance of a mineral patent will be affirmed where the defects in the application alleged by the protestant do not exist or are curable. An application is not defective because it refers to a previously filed application containing necessary information in lieu of including the information itself, or because the notice of application did not mention adjoining claim holders, or because the abstract of title submitted with it does not recognize the existence of adverse claims. Where the patent applicant has contracted with another party to give it a 25-percent interest in the claims, but has not transferred this interest to it by deed or other instrument of record, it is not improper for the applicant to apply as the sole applicant. If the interest is subsequently legally transferred, and the transfer is recorded, the application may be amended to reflect this fact.

John R. Meadows, 43 IBLA 35 (Sept. 12, 1979)

PLACER CLAIMS

"Lode" and "placer." A placer mining claim has been defined as ground within defined boundaries which contain mineral in its earth, sand, or gravel; ground that includes valuable deposits not in place, that is, not fixed in rock, but which are in a loose state, and may in most cases be collected by washing or amalgamation without milling. Whereas, a lode or vein has been defined as any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock; a body of mineral or mineral bearing rock within defined boundaries.

When mining claims have been located as placer claims for perlite which lies in a "blanket" or "pancake" in an almost horizontal plane and in its original state is encased between two different types of rock, where in places, the upper rock or layer has been eroded away leaving the perlite exposed at the surface and in other

MINING CLAIMS--Continued

PLACER CLAIMS--Continued

places on the claims the upper layer is still present, and the mining of the perlite is characterized as essentially a hard rock operation, and when it is first extracted from the ground and then processed or, in effect, milled to produce a marketable product, the perlite is properly classified as a lode deposit which will not sustain a placer location.

United States v. Estate of Arthur C. W. Bowen (Deceased), and Superior Perlite Mines, Inc. (Contestees), Harborlite Corp. (Intervenor), 38 IBLA 390 (Jan. 8, 1979)

POSSESSORY RIGHT

In the absence of a specific regulation or policy directive specifying the type of proof necessary for recordation, the Bureau of Land Management should liberally consider attempts by a mining claimant under sec. 314 of the Federal Land and Policy Management Act to record notice of a mining claim where proof of recording cannot be made and 30 U.S.C. § 38 (1976) is relied upon for holding the claim, and before rejecting a filing for such a claim, BLM should request further evidence from the claimant which it would consider satisfactory. Such evidence should include at a minimum the name the claim is and has been known by, the name and address of the claimant, an adequate description of the claim, the type of claim, the time of holding and working the claim to meet a State's statute of limitations and, if possible, the date of the origin of claimant's title and facts as to continuation of possession of the claim, and any other information available showing a chain of title to the claimant and bearing upon the possession and occupancy of the claim for mining purposes, and other information which the Bureau of Land Management deems essential to meet the purposes of the recordation provision.

Philip Sayer, 42 IBLA 296 (Aug. 27, 1979)

A party filing notice of alleged adverse mining claims with BLM is properly advised that he is required within 30 days of such filing to commence proceedings in a court of competent jurisdiction to determine the question of right of possession to the claims as between him and his rival claimant. During the pendency of this action, patent proceedings will be stayed.

John R. Meadows, 43 IBLA 35 (Sept. 12, 1979)

POWERSITE LANDS

Where a mining claim has been located pursuant to the Mining Claims Rights Restoration Act, 30 U.S.C. §§ 621-625 (1970), on land withdrawn for powersite, it is proper to prohibit placer mining if there is a likelihood of substantial interference with the use of the land for fishing, hunting, recreation, and the recovery of archaeological values.

The Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a (1970), does not require the granting of permission for placer mining operations on land within a powersite withdrawal where such operations would probably interfere with other uses of the land.

United States v. Edward J. Connolly, Jr., Idaho Fish and Game Department (Intervenor), 40 IBLA 30 (Mar. 15, 1979)

MINING CLAIMS--Continued

RECORDATION

Under sec. 314(b) of the Federal Land Policy and Management Act of Oct. 21, 1976, 43 U.S.C. § 1744(b) (1976), and 43 CFR 3833.1-2, the owner of an unpatented lode or placer mining claim located after Oct. 21, 1976, shall, within 90 days after the date of location of such claim, file in the proper BLM office a copy of the official record of the notice of location or certificate of location. Failure to file such instruments shall be deemed conclusively to constitute an abandonment of the mining claim by the owner.

Roy M. Byram, 39 IBLA 32 (Jan. 15, 1979)

Phillip M. Gardiner et al., 41 IBLA 391 (July 24, 1979)

Under sec. 314(a) of the Federal Land Policy and Management Act of 1976, the owner of an unpatented mining claim must file a notice of intention to hold his claim prior to Dec. 31 of the calendar year following the date of location of such claim, or the claim shall be deemed conclusively to have been abandoned.

Juan Munoz, 39 IBLA 72 (Jan. 24, 1979)

Under sec. 314(b) of the Federal Land Policy and Management Act of Oct. 21, 1976, 43 U.S.C. § 1744(b) (1976), and 43 CFR 3822.1-2, the owner of a mining claim located after Oct. 21, 1976, must file a notice of recordation of the claim with the proper Bureau of Land Management office within 90 days of location of the claim, or the claim is deemed abandoned and void.

Dale C. DeLor, 40 IBLA 88 (Mar. 22, 1979)

Under sec. 314(b) of the Federal Land Policy and Management Act of 1976, unless the required copy of the official record of location is filed in the proper BLM office within 90 days from the date of location, a mining claim located after Oct. 21, 1976, is void and any later filing of the notice is invalid.

Lawrence A. Landry, 40 IBLA 212 (Apr. 10, 1979)

Under sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), and 43 CFR 3833.1-2, the owner of a mining claim located after Oct. 21, 1976, must file a notice of recordation of the claim with the proper Bureau of Land Management office within 90 days of location of the claim. A notice must be received and date stamped in the BLM office within the 90-day period to be timely filed.

M. J. Reeves, 41 IBLA 92 (June 4, 1979)

Under the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a)(2) (1976), if an unpatented mining claim located after Oct. 21, 1976, is not supported annually by either an affidavit of assessment work or notice of intention to hold, the claim will be conclusively deemed abandoned and void, despite appellant's statement there was no intent to abandon and that failure to file was an oversight.

Nuclear Power and Energy Co. and B-2, Inc., 41 IBLA 142 (June 14, 1979)

MINING CLAIMS--Continued

RECORDATION--Continued

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of an application by State of Alaska to select lands segregates those lands from all subsequent appropriations, including locations under the mining law. A mining claim located on land which has been segregated and closed to mineral entry is properly declared null and void ab initio.

John C. Schandelmeier, 42 IBLA 240 (Aug. 22, 1979)

Under sec. 314(b) of the Federal Land Policy and Management Act of Oct. 21, 1976, 43 U.S.C. § 1744(b) (1976), and 43 CFR 3822.1-2, the owner of a mining claim located after Oct. 21, 1976, must file a notice of recordation of the claim with the proper Bureau of Land Management office within 90 days of location of the claim, or the claim is deemed abandoned and void.

"Date of Location." Under 43 CFR 3833.0-5(h), for claims located in Nevada, "date of location" is the date indicated in the notice of location or discovery posted on an unpatented mining claim.

Jim Spicer, 42 IBLA 288 (Aug. 27, 1979)

Sec. 314 of the Federal Land Policy and Management Act of 1976 was enacted to establish a Federal recording system for mining claims to facilitate Federal land use planning and management. Failure to comply with the mandatory filing requirements constitutes abandonment of the claim and the land reverts to the status of public domain.

In the absence of a specific regulation or policy directive specifying the type of proof necessary for recordation, the Bureau of Land Management should liberally consider attempts by a mining claimant under sec. 314 of the Federal Land and Policy Management Act to record notice of a mining claim where proof of recording cannot be made and 30 U.S.C. § 38 (1976) is relied upon for holding the claim, and before rejecting a filing for such a claim, BLM should request further evidence from the claimant which it would consider satisfactory. Snch evidence should include at a minimum the name the claim is and has been known by, the name and address of the claimant, an adequate description of the claim, the type of claim, the time of holding and working the claim to meet a State's statute of limitations and, if possible, the date of the origin of claimant's title and facts as to continuation of possession of the claim, and any other information available showing a chain of title to the claimant and bearing upon the possession and occupancy of the claim for mining purposes, and other information which the Bureau of Land Management deems essential to meet the purposes of the recordation provision.

Philip Sayer, 42 IBLA 296 (Aug. 27, 1979)

The regulation, 43 CFR 3833.2-1(b)(1), requiring evidence of assessment work to be filed prior to Dec. 31 of the year following location of the claim, is mandatory. Failure to comply therewith must result in a finding that the claim has been abandoned.

Donald L. Fulgham, 42 IBLA 338 (Aug. 30, 1979)

Department of the Interior, as agency of executive branch of Government, is not proper fornm to decide whether or not as to mining claims the recordation provisions of the Federal Land Policy and Management Act of 1976 are constitutional.

For the purposes of filing affidavits of assessment work or notices of intention to hold a mining claim,

MINING CLAIMS--Continued

RECORDATION--Continued

the date of location of the claim is the date as defined in 43 CFR 3833.0-5(h).

Charlie Carnal, Walter Peck, and Edward Borzansky, 43 IBLA 10 (Sept. 11, 1979)

The regulations governing recordation of mining claims are mandatory, and failure to comply therewith must result in a finding that the claim has been abandoned. Where appellants timely file for record an "amended" location notice, accompanied by the original location notice which is untimely on its face, the mining claim is properly deemed abandoned as to the original location, but not as to the "amended" claim if it is a relocation of the claim under the law.

Walter T. Paul, James H. Meyer, 43 IBLA 119 (Sept. 24, 1979)

SPECIAL ACTS

Where it is determined that a person or association, they and their grantors, have met the fundamental requirements of the possessory rights section of the mining laws, 30 U.S.C. § 38 (1976), i.e., where they have held and worked their claims in this instance for the qualifying period of 5 years under the Arizona statute of limitations covering actions to recover real property, they are entitled to a patent to those areas where there are no conflicting mining claims, regardless of the fact that the claims were improperly located as placer claims for perlite lode deposits.

United States v. Estate of Arthur C. W. Bowen (Deceased), and Superior Perlite Mines, Inc. (Contestees), Harborlite Corp. (Intervenor), 38 IBLA 390 (Jan. 8, 1979)

SURFACE USES

Where a mining claim has been located pursuant to the Mining Claims Rights Restoration Act, 30 U.S.C. §§ 621-625 (1970), on land withdrawn for powersite, it is proper to prohibit placer mining if there is a likelihood of substantial interference with the use of the land for fishing, hunting, recreation, and the recovery of archaeological values.

The Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a (1970), does not require the granting of permission for placer mining operations on land within a powersite withdrawal where such operations would probably interfere with other uses of the land.

United States v. Edward J. Connolly, Jr., Idaho Fish and Game Department (Intervenor), 40 IBLA 30 (Mar. 15, 1979)

A bond filed by a mining claim owner, covering lands patented under the Stock-Raising Homestead Act of Dec. 29, 1916, as amended, 43 U.S.C. §§ 291-301 (1970), need only be set in an amount to cover damages to crops, improvements, and the value of the land for grazing purposes within the limits of the mining claim. The ad damnum of the bond does not have to be sufficient to cover damages caused by a disruption of the surface owner's entire grazing operation.

Where surface owners object to the amount of a bond, submitted to the Bureau of Land Management under sec. 9 of the Stock-Raising Homestead Act of Dec. 29, 1916, as amended, 43 U.S.C. § 299 (1970), as being inadequate in amount, request a hearing thereon, but fail to tender any evidence which would impel the conclusion that a

MINING CLAIMS--Continued

SURFACE USES--Continued

hearing is likely to be productive and meaningful, the request for a hearing is properly denied.

The owner of a patented stock-raising homestead, in which the minerals have been reserved to the United States under the Act of Dec. 29, 1916, as amended, has a sufficient adverse interest under 43 CFR 4.450-1, to initiate a contest against a mining claimant, alleging lack of discovery of valuable minerals.

The issue of whether a mining claim has been perfected by discovery of available mineral has no place in a proceeding to determine whether the amount of a stock-raising homestead bond is sufficient.

Elmer Silvera et al., 42 IBLA 11 (July 25, 1979)

TITLE

The regulations of this Department have the force and effect of law, and are binding upon the Secretary and those who exercise his delegated authority. Where a patent application regulation requires "full, true, and complete abstracts," and the surface of the mining claim has not been patented, the processing of patent applications accompanied only by limited abstracts is properly suspended, pending compliance with the regulation. Where, however, the surface of the mining claim has been patented, e.g., under the Stock-Raising Homestead Act, 43 U.S.C. §§ 291-300 (1970), the abstract generally need only reflect transactions affecting the mineral estate. A certificate of title is acceptable in lieu of an abstract in either situation.

Kerr-McGee Nuclear Corp. et al., 41 IBLA 197 (June 22, 1979)

TUNNEL SITES

Under 30 U.S.C. § 27 (1976), the Tunnel Site Act, a mining contest complaint charging that a tunnel site was not being worked with reasonable diligence is properly dismissed with respect to such charge where it sought to have such tunnel site declared null and void, but the statute provides only that the consequence of failure to work a tunnel site is the forfeiture of right to all undiscovered veins therein.

United States v. Livingston Silver, Inc., 43 IBLA 84 (Sept. 19, 1979)

WITHDRAWN LAND

A mining claim located on land which is not subject to mineral entry at the time of location is null and void from its inception and confers no rights on the locator.

W. R. and Margaret W. Collier, 39 IBLA 81 (Jan. 24, 1979)

A mining claim located on land which has been previously withdrawn from location under the mining laws may be properly declared null and void ab initio without a hearing. Such a claim confers no rights on the locator or a subsequent grantee and will not be validated by the modification or revocation of the order of withdrawal to open the land thereafter to mineral entry. It is immaterial whether the lands are presently being, or have ever been, used for the purpose for which they were withdrawn.

Wendell L. Garrett d.b.a. Garrett Industries, 39 IBLA 85 (Jan. 24, 1979)

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

Designation of a river for potential addition to the national wild and scenic rivers system, pursuant to the Wild and Scenic Rivers Act of 1968, as amended, 16 U.S.C. § 1271 et seq. (1976), withdraws Federal lands constituting the bed or bank or within one-quarter mile of the bank of such river from all forms of appropriation under the mining laws, and on appeal the mining claimant bears the burden of showing by survey or other evidence that his claim is outside the withdrawn area.

Portions of mining claims located on lands within a withdrawal and not open to mineral entry are properly declared null and void ab initio.

Barry C. Binning, 39 IBLA 390 (Feb. 28, 1979)

Lands segregated on the public records by a proposed withdrawal posted Apr. 6, 1973, or a Recreational and Public Purposes Classification filed Nov. 13, 1956, were not available for the location of mining claims, and claims thereafter located are null and void ab initio.

Delmer McLean et al., 40 IBLA 34 (Mar. 15, 1979)

A mining claim located on land previously withdrawn from appropriation under the mining laws is null and void ab initio.

Gerald Byron Bannon, 40 IBLA 162 (Mar. 30, 1979)

Tilden Holloway, Roland Wright, 43 IBLA 134 (Sept. 28, 1979)

Two mining claims, located at a time when the land is withdrawn from mineral entry, may be properly declared null and void ab initio without a hearing. Such a result obtains despite reference to a location notice prior to the withdrawal where appellants do not make a showing of sufficient specific facts upon which to predicate a hearing, including which of the claims the previous location relates to, the boundaries thereof, whether the previous location was for a locatable mineral under a withdrawal order then in force, and the name of the previous locator.

The Heirs of M. K. Harris, 42 IBLA 44 (July 3, 1979)

Where the land on which the mining claim is located is subsequently withdrawn, the validity of the claim must be determined as of the date of the withdrawal and through the date of the hearing. If there was no discovery as of the date of the withdrawal, the land would not be excepted from the effect of the withdrawal and the claim could not thereafter become valid even though the requirement of discovery was satisfied at a later date.

It was proper to deny mining claimants' request to redrill on mining claims after the land was withdrawn from mining where the work would be an effort to make a discovery of a valuable mineral deposit within the claim rather than simply a confirmation or corroboration of a discovery prior to the withdrawal.

United States v. William Lavon Chappell et al., 42 IBLA 74 (Aug. 13, 1979)

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of a State's application to select lands segregates these lands from all subsequent appropriation, including locations under the mining laws.

A mining claim located on land which was then segregated and closed to mineral entry is properly declared null and void ab initio.

Joe D. Denson, 43 IBLA 136 (Sept. 28, 1979)

MINING CLAIMS RIGHTS RESTORATION ACT

Where a mining claim has been located pursuant to the Mining Claims Rights Restoration Act, 30 U.S.C. $$ 621-625 (1970), on land withdrawn for powersite, it is proper to prohibit placer mining if there is a likelihood of substantial interference with the use of the land for fishing, hunting, recreation, and the recovery of archaeological values.

The Mining and Minerals Policy Act of 1970, 30 U.S.C. $ 21a (1970), does not require the granting of permission for placer mining operations on land within a powersite withdrawal where such operations would probably interfere with other uses of the land.

United States v. Edward J. Connolly, Jr., Idaho Fish and Game Department (Intervenor), 40 IBLA 30 (Mar. 15, 1979)

MISTAKES

GENERALLY

BLM personnel may not attempt to "correct," complete, or interpret entries on oil and gas lease offer application forms in such a way as to perfect an otherwise unacceptable application, nor may an applicant "cure" a defect on his drawing entry card by the submission of supplemental information after the drawing.

Resources Exploration & Mining, Inc. (On Reconsideration), 43 IBLA 89 (Sept. 19, 1979)

MULTIPLE MINERAL DEVELOPMENT ACT

GENERALLY

Lands which were subject to an oil and gas lease offer on Sept. 20, 1951, were not open to mineral location, and mining claims located on such lands on this date are properly declared null and void in the absence of compliance with the redemption provisions of the Act of Aug. 12, 1953, and the Multiple Mineral Development Act, requiring filing of an amended notice of location prior to Dec. 10, 1953, in the place and manner in which the original notice was of record.

A mining claimant's failure to comply with the redemption provision of the Act of Aug. 12, 1953, and the Multiple Mineral Development Act is not excused because BLM failed to notify her of the availability of this provision.

Dorothy Smith, 39 IBLA 306 (Feb. 23, 1979)

MULTIPLE MINERAL DEVELOPMENT ACT--Continued

GENERALLY--Continued

An application for permit to drill for oil and gas in a designated Potash Area is properly denied where the applicant fails to show that his application comes within either of the two exceptions to the policy in favor of potash development enunciated in an Order of the Secretary, dated Oct. 7, 1975, 40 FR 51486.

Belco Petroleum Corp., 42 IBLA 150 (Aug. 16, 1979)

Prior to passage of the Multiple Mineral Development Act, 30 U.S.C. $$ 521-31 (1976), a prima facie valid mineral lease, or application therefor, though void and ineffectual to vest any rights to minerals subject to the mining laws in the lessee segregated the land from the operation of the mining laws and prevented the initiation of rights under the mining laws by another person until it had been set aside and removed from the records of the land office.

Charles House, Mrs. Leonard Skinner, 42 IBLA 364 (Sept. 11, 1979)

MULTIPLE USE

Prior to passage of the Multiple Mineral Development Act, 30 U.S.C. $$ 521-31 (1976), a prima facie valid mineral lease, or application therefor, though void and ineffectual to vest any rights to minerals subject to the mining laws in the lessee segregated the land from the operation of the mining laws and prevented the initiation of rights under the mining laws by another person until it had been set aside and removed from the records of the land office.

Charles House, Mrs. Leonard Skinner, 42 IBLA 364 (Sept. 11, 1979)

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

GENERALLY

The Secretary of the Interior is obligated to support and implement the national policy expressed by Congress in the National Environmental Policy Act of 1969.

Southern California Motorcycle Club, Inc., Sierra Club, 42 IBLA 164 (Aug. 17, 1979)

ENVIRONMENTAL STATEMENTS

Where a proposed Federal timber sale would allow the cutting of trees on a 162-acre tract pursuant to a properly promulgated decision of the Director of the Bureau of Land Management concerning the allowable cut in that district, such sale does not, by itself, constitute a major Federal action significantly affecting the quality of the human environment such as will require the preparation of an environmental impact statement prior to the sale.

George Jalbert et al., 39 IBLA 205 (Feb. 2, 1979)

To secure the exemption under sec. 404(r) of the Federal Water Pollution Control Act for projects described in an environmental statement, compliance with seven specific conditions is required. The exemption does not apply to the maintenance of existing Federal projects, but only

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

ENVIRONMENTAL STATEMENTS--Continued

to new construction. While the exemption provides an alternative procedure to achieve compliance with sec. 404 of the Act for a limited category of Federal projects under very specific conditions, it does not lessen the substantive requirements that apply to the discharge of dredged or fill material.

Permit Requirements for Discharge of Dredged or Fill Material Under Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. § 1344, M-36915 (Aug. 27, 1979) 86 I.D. 400

NATIONAL PARK SERVICE AREAS

GENERALLY

The Act of Mar. 27, 1978, 92 Stat. 166, 16 U.S.C.A. § 1a-1 (West Supp. 1979), provides that actions taken in derogation of park values and purposes shall not be authorized unless specifically provided by Congress, in order to ensure that the resources and values of areas in the National Park System are afforded the highest protection and care in governmental decisions.

Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914 (June 25, 1979) 86 I.D. 553

WATER RIGHTS

The particular reserved water rights for national park and national monument areas include water required for scenic, natural, and historic conservation uses; wildlife conservation uses; sustained public enjoyment uses; and National Park Service personnel uses; all of which are intimately related to the fundamental purpose for park and monument reservation, as articulated in 16 U.S.C. § 1 (1976).

Among other reserved water rights for national parks and national monuments, 16 U.S.C. § 1 (1976) encompasses reserved water rights for concession uses to provide sustained public enjoyment and reserved water rights for water-borne public enjoyment and recreation.

Congress has taken no action subsequent to the National Park Service Organic Act of Aug. 25, 1916, 39 Stat. 535, 16 U.S.C. § 1 (1976), to negate the implied intent contained in the Organic Act that all unappropriated waters necessary to fulfill the purposes of park areas are reserved as of the date of the enabling legislation.

The discretionary authority contained in the Act of Aug. 7, 1946, 60 Stat. 885, 16 U.S.C. § 17j-2(g) (1976), authorizing the National Park Service to acquire water rights in accordance with local laws, is not inconsistent with the assertion of the reserved water rights principle and is readily distinguishable from Acts requiring deference to State water law.

As a general rule, the above-developed reserved water rights apply to components of the National Park System other than national parks and national monuments, though the extent of particular reserved water rights must be determined on a case-by-case basis, involving an interpretation of 16 U.S.C. § 1 (1976) and the establishing legislation.

NATIONAL PARK SERVICE AREAS--Continued

WATER RIGHTS--Continued

The National Park Service and Fish and Wildlife Service may appropriate water to fulfill any congressionally authorized function for areas under their administration.

Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914 (June 25, 1979) 86 I.D. 553

NAVIGABLE WATERS

The Mineral Leasing Act for Acquired Lands does not exclude from oil and gas leasing those lands underlying the Missouri River within the boundaries of the Fort Berthold Indian Reservation as established by the Treaty of Fort Laramie (1851) and the Executive Order of Apr. 12, 1870, which were reacquired by the United States from the Indian tribes. The exclusion in the Act for submerged lands refers to submerged coastal lands, as set forth in 43 CFR 3101.2-1(g).

Prior to the admission of North Dakota to the Union on Nov. 8, 1889, the United States could grant lands underlying the Missouri River, a navigable river, to establish the Fort Berthold Indian Reservation. After said date, it could condemn or otherwise acquire these lands for construction of the Garrison Dam and Reservoir.

The language of the Treaty of Fort Laramie and the Executive Order of Apr. 12, 1870, when considered with the case law and various utterances made contemporaneously with the Treaty, discloses an intention to include the lands underlying the Missouri River, insofar as it runs through the Fort Berthold reservation, among the lands of the reservation itself.

Impel Energy Corp., 42 IBLA 105 (Aug. 16, 1979)

The requirement for a permit under sec. 404 of the Federal Water Pollution Control Act applies to the Bureau of Reclamation to the same extent as any other person, and with certain exceptions the Bureau must obtain a permit from the Corps of Engineers prior to any discharge of dredged or fill material into the navigable waters.

Activities "affirmatively authorized by Congress," which are excepted from sec. 10 of the Rivers and Harbors Act of 1899, are not excepted from sec. 404 of the Federal Water Pollution Control Act. Notwithstanding the exception of a discharge of dredged or fill material under sec. 10 of the Rivers and Harbors Act, compliance with sec. 404 is required.

A permit under sec. 404 of the Federal Water Pollution Control Act is required for the discharge of dredged or fill material whenever: (a) the "discharge" constitutes any addition of any pollutant to navigable waters from any discernible, confined and discrete conveyance, including the placement of fill and the building of any structure or impoundment; and (b) the "dredged material" is dredged spoil that is excavated or dredged from the waters of the United States; or (c) the "fill material" includes any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body, including any structure which requires rock, sand, dirt or other material for its construction; and (d) the discharge is made into "waters of the United States," which extend beyond those waters meeting the traditional tests of

NAVIGABLE WATERS--Continued

navigability to those encompassed by the broadest possible constitutional interpretation.

Permit Requirements for Discharge of Dredged or Fill Material Under Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. § 1344, M-36915 (Aug. 27, 1979) 86 I.D. 400

NOTICE

GENERALLY

All persons dealing with the Government are presumed to have knowledge of duly promulgated regulations.

Juan Munoz, 39 IBLA 72 (Jan. 24, 1979)

Charles and Pete Caress, 41 IBLA 302 (June 29, 1979)

A mining claimant's failure to comply with the redemption provision of the Act of Aug. 12, 1953, and the Multiple Mineral Development Act is not excused because BLM failed to notify her of the availability of this provision.

Dorothy Smith, 39 IBLA 306 (Feb. 23, 1979)

All persons dealing with the Government are presumed to have knowledge of duly promulgated statutes and regulations.

Dale C. DeLor, 40 IBLA 88 (Mar. 22, 1979)

All persons dealing with the Government are presumed to have knowledge of duly promulgated regulations. Such regulations have the force and effect of law and are binding on the Department.

Fred S. Ghelarducci, 41 IBLA 277 (June 28, 1979)

Bernard P. Gencorelli, 43 IBLA 7 (Sept. 11, 1979)

Where BLM sends by certified mail a request for payment of advance rental to the address of record of a successful offeror in a simultaneously filed oil and gas lease drawing and such request is returned by the Post Office, marked "Moved, left no address," the offeror is properly deemed to have "receipt of notice" under 43 CFR 1810.2. Where the address of record of the offeror is that of a leasing service and the leasing service moves, filing a change of address form with the Post Office in the name of the leasing service, but not in the name of appellant, the Post Office properly returned the notice addressed to the offeror to BLM.

Roy Lindgren, 43 IBLA 139 (Sept. 28, 1979)

OFFICE OF HEARINGS AND APPEALS

The Board of Land Appeals, in its adjudication of appeals to determine rights of parties to receive or preserve interests in Federal lands, has a concomitant obligation to preserve the integrity of the process, and where it appears to the Board that the administrative record of a case contains strong evidence of multiple violations of 18 U.S.C. § 1001 (1976), the Board will refer the matter with its recommendation that an

OFFICE OF HEARINGS AND APPEALS--Continued

investigation be initiated to determine whether criminal charges should be brought.

Lee S. Bielski, 39 IBLA 211 (Feb. 8, 1979) 86 I.D. 80

A decision by the Bureau of Land Management canceling fee simple patents issued to Indians and simultaneously issuing new Indian trust patents is not subject to review by the Board of Land Appeals, which has no jurisdiction in the matter, where the decision was made at the direction of the Assistant Secretary for Indian Affairs.

Blue Star, Inc., Atomic Western, Inc., Fremont Energy Corp., Ivor Adair, 41 IBLA 333 (July 11, 1979)

OIL AND GAS LEASES

GENERALLY

Where an offeror for a noncompetitive, over-the-counter oil and gas lease certifies that he is a United States citizen, his failure to disclose whether he is a native-born or naturalized citizen will not support rejection of his offer where an offeror for a noncompetitive, simultaneous oil and gas lease is not required to disclose similar information.

Jas. O. Breene, Jr., 39 IBLA 43 (Jan. 16, 1979)

Land included within an outstanding oil and gas lease is not available to leasing and an oil and gas lease offer filed for such land must be rejected.

Alver C. Duncan, 39 IBLA 144 (Jan. 29, 1979)

The maxim, expressio unius est exclusio alterius, will not be utilized to contradict or vary a clear expression of legislative intent.

When a State Office rejects the offer of a first-drawn applicant in a drawing under the simultaneous oil and gas leasing program, an appeal by the applicant raises the issue of his qualifications to hold the lease. The qualifications of the second-drawn applicant are irrelevant until such time as the offer of the first-drawn applicant is rejected and all his avenues of appeal are exhausted. However, it is not improper for BLM to name the second-drawn applicant as an adverse party in a decision rejecting the first-drawn applicant.

Thomas R. Flickinger, William S. Flickinger, et al., 40 IBLA 53 (Mar. 16, 1979)

Where the State Office, following recommendations of the National Park Service, rejects applications for oil and gas leases under the "excepted areas" provisions of 43 CFR 3111.1-3(e)(4), and where it appears that large portions of the applied-for lands do not fall within such areas, the case will be remanded to reconsider whether the leasing of lands not in excepted areas would be appropriate.

D. L. Percell, 40 IBLA 126 (Mar. 28, 1979)

OIL AND GAS LEASES--Continued

GENERALLY--Continued

An oil and gas lease which is in its extended term because of production terminates when production ceases unless pursuant to 30 U.S.C. § 226(f) (1976): (1) reworking or drilling operations are begun within 60 days after cessation and are continued with reasonable diligence until production resumes; (2) the Secretary has ordered or consented to suspension of operations or production; or (3) for lands on which there is a well capable of production, the lessee places the well in producing status at least within 60 days of receipt of notice to do so.

Vern H. Bolinder and Julienne J. Bolinder, 40 IBLA 164 (Apr. 3, 1979)

It is proper to set aside a decision which raises questions concerning the facts asserted by BLM in rejecting an oil and gas lease offer, and to remand the case to BLM for further review and consideration of appellant's allegations.

Robert W. David, 40 IBLA 236 (Apr. 16, 1979)

Generally, the signing of an oil and gas lease by the authorized officer of the Bureau of Land Management is the act that constitutes issuance of the lease. When land is determined to be within a known geologic structure prior to authorized issuance of a lease, noncompetitive lease offers must be rejected and the land may be leased only by competitive bidding.

United States v. William T. Alexander (On Court Remand), 41 IBLA 1 (May 21, 1979)

The U.S. Geological Survey is the Secretary's technical expert in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases and the Secretary is entitled to rely on its reasoned analysis.

Southern Union Exploration Co., 41 IBLA 81 (May 31, 1979)

Oil and gas offers, filed for lands withdrawn by PLO No. 5418, must be rejected. The order was issued under the authority of the Pickett Act, 43 U.S.C. §§ 141-142 (1970), repealed by FLPMA, and the order was not arbitrary, capricious, or an abuse of discretion.

Bristol Bay Native Corp., 41 IBLA 85 (June 4, 1979)

The requirement of forfeiture of the bid deposit if the qualified high bidder fails to enter a lease must be enforced to prevent those bidders with greater capital resources from gaining an unfair advantage.

Fred S. Ghelarducci, 41 IBLA 277 (June 28, 1979)

Not all persons may be qualified to be lessees. Signing and dating the entry card constitute certification by the offeror of his qualifications as of a date certain.

As used in 43 CFR 3112.2-1, the term "fully executed" means that the applicant must, in order to render the entry card a valid and complete offer to lease, supply the information requested thereon, including the date.

Harry A. Zuckerman et al., 41 IBLA 372 (July 23, 1979)

OIL AND GAS LEASES--Continued

GENERALLY--Continued

An oil and gas lease may be awarded to the first-qualified applicant only. The regulations governing qualifications are mandatory, and strict compliance therewith is required.

A defective drawing card offer for an oil and gas lease is not curable by submission of required evidence of qualifications after the drawing, for the reason that the rights of the second- and third-drawn qualified offerors have intervened. Where appellant's offer was third drawn and eventually accorded priority and then ultimately disqualified, the parcel described therein must be included in a subsequent list of lands available for simultaneous filing.

An offeror for oil and gas lease may withdraw his offer at any time prior to the drawing. However, the filing fee is retained as a service charge irrespective of the outcome of the drawing.

Don C. Bell II (Trustee), 42 IBLA 21 (July 25, 1979)

Where an offer is drawn No. 1 in a simultaneous oil and gas lease drawing and the offeror is notified by BLM that the rental due is $1,955, the offer will be disqualified under 43 CFR 3112.4-1 when the offeror submits a check for $1,954 within the time required, but fails to submit the $1 deficiency within the allowed time.

C. Panos, 42 IBLA 326 (Aug. 30, 1979)

The State laws applicable to Federal oil and gas leases are limited to those classes of laws authorized or recognized by sec. 32 of the Mineral Leasing Act, as amended, 30 U.S.C. § 189 (1976).

Where an applicant with first priority dies after filing an oil and gas lease application but prior to issuance of the lease, his personal representative, heirs, or devisees are entitled to the lease provided there is filed in all cases an offer to lease in compliance with 43 CFR 3102.8. Such offer will be effective as of the date of the original lease offer filed by the deceased.

Lamar M. Richardson, Jr., 42 IBLA 333 (Aug. 30, 1979)

Prior to passage of the Multiple Mineral Development Act, 30 U.S.C. §§ 521-31 (1976), a prima facie valid mineral lease, or application therefor, though void and ineffectual to vest any rights to minerals subject to the mining laws in the lessee segregated the land from the operation of the mining laws and prevented the initiation of rights under the mining laws by another person until it had been set aside and removed from the records of the land office.

Charles House, Mrs. Leonard Skinner, 42 IBLA 364 (Sept. 11, 1979)

Failure to execute a lease results in forfeiture of the bid deposit by the high bidder in a competitive oil and gas lease sale.

Bernard P. Gencorelli, 43 IBLA 7 (Sept. 11, 1979)

OIL AND GAS LEASES--Continued

GENERALLY--Continued

Noncompetitive oil and gas leases are issued for a primary term of 10 years. Unless one of the statutory grounds for extension is established, such leases expire by operation of law at the end of their primary term.

James E. and Mary E. Grohoski, 43 IBLA 94 (Sept. 19, 1979)

Land within the National Desert Wildlife Range is not subject to noncompetitive oil and gas leasing.

Kenneth F. Cummings, 43 IBLA 110 (Sept. 24, 1979)

ACQUIRED LANDS LEASES

The Mineral Leasing Act for Acquired Lands does not exclude from oil and gas leasing those lands underlying the Missouri River within the boundaries of the Fort Berthold Indian Reservation as established by the Treaty of Fort Laramie (1851) and the Executive Order of Apr. 12, 1870, which were reacquired by the United States from the Indian tribes. The exclusion in the Act for submerged lands refers to submerged coastal lands, as set forth in 43 CFR 3101.2-1(g).

Impel Energy Corp., 42 IBLA 105 (Aug. 16, 1979)

ACREAGE LIMITATIONS

An oil and gas lease issued for land available for leasing, but in violation of an administrative regulatory requirement, need not be canceled in the absence of an intervening qualified applicant or some overriding policy consideration.

Merle C. Chambers, 40 IBLA 144 (Mar. 29, 1979)

APPLICATIONS

Generally

Where an offeror for a noncompetitive, over-the-counter oil and gas lease certifies that he is a United States citizen, his failure to disclose whether he is a native-born or naturalized citizen will not support rejection of his offer where an offeror for a noncompetitive, simultaneous oil and gas lease is not required to disclose similar information.

Jas. O. Breene, Jr., 39 IBLA 43 (Jan. 16, 1979)

A noncompetitive oil and gas lease offer for acquired lands, filed "over-the-counter," is properly rejected when the accompanying rental payment is deficient by more than 10 percent. However, where the balance of the rental is tendered with the notice of appeal, the offer may be reinstated with priority from the date the deficiency was corrected.

George S. Swan, 39 IBLA 47 (Jan. 16, 1979)

A final Departmental appellate decision construing a regulation will be given immediate effect, and will not be applied with prospective effect only, unless the decision alters materially the interpretation given the

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

regulation by earlier Departmental decisions or official published opinions, and unless the equitable benefit of the decision is not outweighed by ill effects of allowing a benefit in derogation of the regulation.

Gertrude H. D'Amico, 39 IBLA 68 (Jan. 17, 1979)

It is proper for the Bureau of Land Management to refuse to accept a filing fee check accompanying drawing entry cards for simultaneous oil and gas lease offers where the check bears the figure amount of $110, the correct amount due, and the typewritten amount of "One hundred eleven and no/100."

Bertram F. Rudolph, Jr., 39 IBLA 167 (Jan. 30, 1979)

Where an oil and gas lease offeror fails to respond within a prescribed period of time to an order to submit specific information necessary to determine whether his offer is valid, it is appropriate to reject the offer.

Where a protestant against the issuance of an oil and gas lease supports his allegations that the lease offer is not qualified with sufficient evidence to warrant further inquiry or investigation by BLM, the protest should not be summarily dismissed for failure of the protestant to make positive proof of his allegations. Instead, the protest should be adjudicated on its merits after all available information has been developed.

Lee S. Bielski, 39 IBLA 211 (Feb. 8, 1979) 86 I.D. 80

Under 30 U.S.C. § 226 (1976), the Department has no authority to issue an oil and gas lease to other than the first-qualified applicant, and if an agent signs an offer for an applicant, the applicant cannot be considered qualified unless the statements required by 43 CFR 3102.6-1 have been timely filed.

Where a rubber stamp is used to imprint an applicant's signature, and where no agent's statement has been submitted under 43 CFR 3102.6-1, a State Office may take appropriate action to establish whether the applicant's signature was imprinted at his request and whether he formulated the offer.

Killian L. Huger, Jr., 39 IBLA 332 (Feb. 27, 1979)

Under 30 U.S.C. § 226(b) (1976) land within the known geologic structure of a producing oil or gas field may only be leased by competitive bidding, and where land is determined to be within such a structure while a noncompetitive lease offer is pending, the offer must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination by the Geological Survey that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

Jack J. Bender, 40 IBLA 26 (Mar. 9, 1979)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

An offeror's use of a leasing service's address on a simultaneous noncompetitive oil and gas lease offer drawing entry card does not disqualify the offer. A leasing service bound by a "put option" does not have a hidden interest in the offer and does not violate 43 CFR 3102.7 by failing to disclose this put option or 43 CFR 3112.5-2 by filing offers for more than one client on a parcel.

A successful drawee in a simultaneous oil and gas lease drawing will not be disqualified to receive a lease because of an allegation that his leasing service has failed to observe the registration requirements of the Securities Act of 1933.

D. E. Pack, 40 IBLA 45 (Mar. 15, 1979)

Where a drawing entry card is submitted in a simultaneous oil and gas lease drawing and signed by multiple offerors, the offer is properly rejected if even a single offeror fails to enter the date of his signature on the drawing entry card.

The requirement set forth in 43 CFR 3112.2-1(a) (1977) that a drawing entry card be fully executed is not vague or unclear. Hence, a DEC signed by multiple offerors is properly rejected if even a single offeror fails to enter the date on the drawing entry card.

The date of each signature on a drawing entry card is important, because it shows that on that particular date, the offerors, by their respective signatures, certify, as to each, all the statements made on the card.

Thomas R. Flickinger, William S. Flickinger, et al., 40 IBLA 53 (Mar. 16, 1979)

An entry card in a simultaneous oil and gas lease drawing need not be rejected under 43 CFR 3112.2-1(a) where the State prefix of the parcel number is placed on the card immediately below the boxes provided for designation of the parcel number.

L. Alice Collister, 40 IBLA 71 (Mar. 16, 1979)

When an applicant for a noncompetitive oil and gas lease is requested to provide additional information for the adjudication of his drawing entry card offer, the offer is properly rejected where the evidence provided is illegible, and applicant was notified of the illegibility but responded by sending more illegible evidence.

Richard P. Lewis, 40 IBLA 100 (Mar. 27, 1979)

A drawing entry card in a simultaneous oil and gas lease filing need not be rejected where the card sets out as part of the parcel designation the complete name of the State in which the parcel is located instead of the abbreviated State code prefix.

Ed Pendleton, 40 IBLA 103 (Mar. 27, 1979)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

A noncompetitive oil and gas lease issued for lands which, at the time of the lease application, had been posted erroneously as available for leasing but were then included in a prior lease, will be allowed to continue in effect where the first lease expired before the second lease issued and no questions of public policy or third party rights are contravened by the lease issuance.

Reed Gilmore, 40 IBLA 139 (Mar. 29, 1979)

Unsigned and undated drawing entry cards filed in the simultaneous oil and gas leasing drawings must be rejected. The calling out of the No. 1 drawee's name does not constitute acceptance of the offer. Acceptance of the offer cannot occur until the lease itself has been executed by the appropriate official of the Government.

Darrell J. Sekin, 40 IBLA 156 (Mar. 30, 1979)

A drawing entry card which is not dated in the space provided on the card is not "fully executed," as required by 43 CFR 3112.2-1, and must be rejected, notwithstanding an allegation that the date of signing might have been deduced from a check accompanying the offer or from the postmark of the envelope in which the offer was submitted.

Donald Miller, 40 IBLA 193 (Apr. 5, 1979)

Donald Miller, 43 IBLA 4 (Sept. 11, 1979)

In cases raising the question whether regulations should be interpreted to the detriment of persons seeking oil and gas leases, the standard to be applied is whether the regulations are so clear that there can be no basis for the applicant's noncompliance. If there is doubt as to their meaning and intent, such doubt should be resolved in applicant's favor.

Robert R. Brambley, 40 IBLA 215 (Apr. 10, 1979)

The essential requirement of the simultaneous oil and gas leasing system is that all properly filed offers be afforded equal opportunity to obtain a lease. Where a system effectively excludes a lease offer from consideration, such a system is arbitrary and capricious.

Milton D. Feinberg, Benson J. Lamp (On Reconsideration), 40 IBLA 222 (Apr. 11, 1979) 86 I.D. 234

Where a drawing entry card is submitted in a simultaneous oil and gas lease drawing and signed by multiple offerors, the offer is properly rejected if even a single offeror fails to enter the date of his signature on the drawing entry card.

The requirement set forth in 43 CFR 3112.2-1(a) that a drawing entry card be fully executed is not vague or unclear. Hence, a DEC signed by multiple offerors is properly rejected if even a single offeror fails to enter the date on the drawing entry card.

Pamela W. Kay, Henry H. Greer, Gregory Montgomery, Franklin J. Sands, 40 IBLA 240 (Apr. 16, 1979)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

A simultaneously filed oil and gas lease offer by a guardian is properly rejected where the offer is neither accompanied by the statements required by 43 CFR 3102.5-1, nor makes reference to the serial number of a record in which such statements have previously been filed.

Charles L. King, 40 IBLA 276 (Apr. 18, 1979)

The fact that the addresses of an oil and gas lease offeror and a filing service are identical does not disqualify the offer or afford the offeror or filing service a greater probability of successfully obtaining a lease or interest therein in violation of 43 CFR 3112.5-2.

Where there is no evidence in the record that the offeror with first priority in a simultaneous oil and gas lease drawing is not the sole party in interest, a protest alleging an interest in a filing service may properly be dismissed.

Charges that an oil and gas lease filing service has not complied with the Securities Act of 1933 are properly raised before the Securities and Exchange Commission rather than the Department of the Interior, which has not been delegated responsibility for enforcement of securities laws.

Joseph J. O'Keefe, 40 IBLA 378 (May 14, 1979)

When an individual files an oil and gas lease offer through a leasing service under a contractual agreement whereby the leasing service is authorized to act as the sole and exclusive agent to negotiate for sublease, assignment, or sale of any rights obtained by the offeror; where the offeror is required to pay the leasing service a commission according to a set schedule on any sale plus a percentage of any royalties, even if the offeror negotiates the sale; and where such agency to negotiate is to be valid for 5 years, the leasing service has an enforceable right to share in the proceeds of any sale of the lease or any interest therein. Such an agreement creates for the leasing service an "interest" in the lease as that term is defined in 43 CFR 3100.0-5(b).

A purported disclaimer by a leasing service of its interests in its clients' offers which is filed with BLM prior to the filing of these offers, but which, by its own terms, does not apply to the interests held by the service in these offers, is ineffectual and does not erase these interests. This disclaimer is also ineffectual as a matter of law even as to a client's offer to which it does apply, where it is unsupported by consideration and where it is not communicated to the client, as it may be retracted by the service. The service's interests in these offers therefore remain extant as of the filing of its clients' offers, notwithstanding the purported disclaimer, and where the existence of its interests is not disclosed on the offer cards as required by 43 CFR 3102.7, BLM properly rejects the offers.

The Government is not estopped from rejecting oil and gas lease offers because the offerors' leasing agent alleges that he relied on a representation by officers of BLM that his disclaimer of his interest in the offer was valid and therefore failed to amend his service agreement with his clients to remove the interest-creating provision, where it appears that BLM did not in fact so represent.

Frederick W. Lowey et al., 40 IBLA 381 (May 14, 1979)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

The failure of the BLM officer to follow the procedure set out in a Secretarial Order requiring all offers, prior to issuance of a lease, to be sent to Geological Survey for a determination of whether the lands are within a known geologic structure, renders the signing of the lease unauthorized, and thus not binding on the Secretary.

United States v. William T. Alexander (On Court Remand), 41 IBLA 1 (May 21, 1979)

Where separate statements of interest are required pursuant to 43 CFR 3102.6-1(a)(2) (1977), this Board must affirm the dismissal of a protest against the issuance of an oil and gas lease which is premised on the protestant's contention that the statement of the offeror must bear his original, holographic signature.

Although a lease offer may not be rejected solely because an agent affixed the offeror's facsimile signature to the offeror's separate statement, this does not prevent BLM from requiring that the offeror personally verify the information contained therein and provide whatever supplemental information may reasonably be required. A private agent may not interpose himself between a lease applicant and the Government so as to mask the identity of the applicant and prevent direct contact by Federal officials who are properly concerned.

W. H. Gilmore, 41 IBLA 25 (May 29, 1979)

An oil and gas lease offer is properly rejected where the offer is neither accompanied by a statement of corporate qualifications nor makes reference to a proper serial number of a record in which such statement had previously been filed.

Where an over-the-counter noncompetitive oil and gas lease offer is filed by a corporation unaccompanied by a statement of its qualifications or a reference by serial number to the record in which it has been filed, and such defect is remedied prior to the filing of any junior offer, the first offer may be considered with priority as of the date the curative data is filed.

NL Industries, Inc., 41 IBLA 38 (May 29, 1979)

It is not proper to reject a drawing entry card oil and gas lease offer solely because an agent affixed the offeror's facsimile signature to both the DEC and to the offeror's separate statement required by 43 CFR 3102.6-1, as BLM may require that the offeror personally verify the information contained in the offer and in the statement, and provide whatever supplemental information that BLM may reasonably require.

Where a drawing entry card is submitted in a simultaneous oil and gas lease drawing and is signed by multiple offerors, the offer is properly rejected if even a single offeror fails to enter the date of his signature on the drawing entry card.

Robert B. Coen et al., 41 IBLA 55 (May 31, 1979)

Strict compliance with 43 CFR 3112.2-1 which provides that simultaneous oil and gas drawing entry cards be signed and fully executed by an applicant or his agent is required.

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

A simultaneous oil and gas lease offer is properly rejected where the State prefix to the parcel number on an oil and gas drawing entry card is omitted.

A simultaneous oil and gas lease offer is properly rejected where the drawing entry card is not dated.

C. H. Coster Gerard, 41 IBLA 74 (May 31, 1979)

Oil and gas offers, filed for lands withdrawn by PLO No. 5418, must be rejected. The order was issued under the authority of the Pickett Act, 43 U.S.C. §§ 141-142 (1970), repealed by FLPMA, and the order was not arbitrary, capricious, or an abuse of discretion.

Bristol Bay Native Corp., 41 IBLA 85 (June 4, 1979)

Strict compliance with 43 CFR 3112.2-1, which provides that simultaneous oil and gas drawing entry cards be signed and fully executed by an applicant or his agent, is required. Where no date of signing appears on an entry card, the offer is properly rejected.

The burden of signing and fully executing a drawing entry card rests on the applicant. Reliance on instructions provided by a non-governmental filing service does not excuse the failure to fully execute a card.

Walter B. Moore, Jr., 41 IBLA 95 (June 4, 1979)

When, in a drawing of simultaneously filed oil and gas lease offers, the first-drawn offeror is notified to submit the first year's advance rental, that rental must be received by the proper office within the prescribed 15 days. Automatic disqualification, stemming from failure to pay timely, will not be avoided by allegations that payment was mailed far enough in advance to arrive at BLM timely.

American Petrofina Co. of Texas, 41 IBLA 126 (June 13, 1979)

An offeror who submits a drawing entry card signed on his behalf by his agent leasing service meets the requirements of 43 CFR 3102.6-1 if satisfactory agency statements by him and his agent, such statements bearing a facsimile signature, are submitted along with his offer card.

"Interest." Where there is an agreement giving an offeror the option of selling part of an oil and gas lease to his agent leasing service, exercisable solely at the offeror's discretion, the agent has a mere hope or expectancy and not an "interest" in the offer, as defined in 43 CFR 3100.0-5(b). A leasing service, which files a simultaneous noncompetitive oil and gas lease offer drawing entry card on behalf of its client, bound by a "put option" does not have a hidden interest in the offer and does not violate 43 CFR 3102.7 by failing to disclose this put option or 43 CFR 3112.5-2 by filing offers for more than one client on a parcel.

Where there is no evidence in the administrative record that the offeror with first priority in a drawing of simultaneous noncompetitive oil and gas lease offers is not the sole party in interest, as stated by both the offeror and his agent, the burden is on a protestant attacking the validity of the offer to present evidence of an accusation that the offeror/agent agreement gives the agent an enforceable interest in the lease to be issued.

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

the agent an enforceable interest in the lease to be issued.

Jack Nask, 41 IBLA 147 (June 18, 1979)

There is no prohibition against an oil and gas lease offeror's using an address which is commonly used by other offerors.

An offeror who submits a drawing entry card signed on his behalf by his agent leasing service meets the requirements of 43 CFR 3102.6-1 if satisfactory agency statements by him and his agent, such statements bearing a facsimile signature, are submitted along with his offer card.

"Interest." Where there is an agreement giving an offeror the option of selling part of an oil and gas lease to his agent leasing service, exercisable solely at the offeror's discretion, the agent has a mere hope or expectancy and not an "interest" in the offer, as defined in 43 CFR 3100.0-5(b). A leasing service, which files a simultaneous noncompetitive oil and gas lease offer drawing entry card on behalf of its client, bound by a "put option" does not have a hidden interest in the offer and does not violate 43 CFR 3102.7 by failing to disclose this put option or 43 CFR 3112.5-2 by filing offers for more than one client on a parcel.

Where there is no evidence in the administrative record that the offeror with first priority in a drawing of simultaneous noncompetitive oil and gas lease offers is not the sole party in interest, as stated by both the offeror and his agent, the burden is on a protestant attacking the validity of the offer to present evidence of an accusation that the offeror/agent agreement gives the agent an enforceable interest in the lease to be issued.

Kelley Everette, 41 IBLA 155 (June 18, 1979)

A decision by BLM rejecting a noncompetitive oil and gas lease drawing entry card offer because someone other than the offeror affixed a facsimile of the offeror's signature on the card and agency statements were not filed as required by 43 CFR 3102.6-1 will be vacated where BLM bases its finding to this effect on a statement made by the offeror 6 months previously concerning the preparation of other, earlier offers, and where the offeror alleges on appeal that she actually affixed the facsimile herself on the offer in question.

Miriam Keizman (Harper), 41 IBLA 166 (June 18, 1979)

The fact that the addresses of the lease offeror and a filing service are identical merely indicates the use of a filing service and does not in itself give the offeror or agent a greater probability of successfully obtaining a lease or interest therein in violation of 43 CFR 3112.5-2.

Where there is no evidence of any violation of the regulations in the record, the burden is on the protestant to submit competent evidence of an accusation that there is an agreement giving a filing service an enforceable interest in the lease, absent which the protest is properly rejected. Allegations that there was a contract between the offeror and a filing service in which the filing service withholds an overriding royalty interest from the offeror and participates in

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

the proceeds, without evidence, is not sufficient to show that the offeror was not a sole party in interest.

Where the purchaser of an oil and gas lease asserts that he purchased the lease from the offeror whose drawing entry card was drawn with first priority, for cash consideration without knowledge of any irregularities or violation of the regulations, he is considered to be a bona fide purchaser, and his lease is not subject to cancellation unless prima facie evidence is presented to the contrary.

J. Theodore Ellis, D. E. Pack, 41 IBLA 231 (June 27, 1979)

Where oil and gas lease offerors enclose agency statements with their drawing entry cards, which statements are clearly intended to, and appear to, apply to their offers, their cards are fully executed notwithstanding their failure to note on the face of the cards that the agency statements are enclosed, as nothing in the regulations or on the card directs an offeror to do so.

Nothing in the regulations requires an agency statement submitted under 43 CFR 3102.6-1(a) to be dated. Rather, the statement is an adjunct to the drawing entry card and is considered dated as of the signing and dating of the card.

An agency statement required by 43 CFR 3102.6-1(a) need not be holographically signed. Rather, such statements may be submitted over facsimile signatures.

Frederick T. Peters et al., 41 IBLA 262 (June 28, 1979)

It is proper to reject a drawing entry card lease offer, given first priority at a drawing, where the name of the offeror is affixed to the card first name, middle initial, last name, not in the appropriate spaces, by means of a rubber stamp, instead of being inserted in the appropriate spaces of the card in this order: last name, first name, middle initial.

Gordon N. Blair, 41 IBLA 288 (June 28, 1979)

Not all persons may be qualified to be lessees. Signing and dating the entry card constitute certification by the offeror of his qualifications as of a date certain.

As used in 43 CFR 3112.2-1, the term "fully executed" means that the applicant must, in order to render the entry card a valid and complete offer to lease, supply the information requested thereon, including the date.

An interpretative rule is a clarification or explanation of an existing regulation, rather than a substantive modification thereof or the adoption of a new regulation.

Harry A. Zuckerman et al., 41 IBLA 372 (July 23, 1979)

An offeror for oil and gas lease may withdraw his offer at any time prior to the drawing. However, the filing fee is retained as a service charge irrespective of the outcome of the drawing.

Don C. Bell II (Trustee), 42 IBLA 21 (July 25, 1979)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

Where the rental payment accompanying a noncompetitive oil and gas lease offer for acquired lands, filed over-the-counter, is deficient by more than 10 percent due to an increase in the rental rate subsequent to the filing of the offer, and Bureau of Land Management requests submission of the deficient rental within 30 days, BLM may properly reject the lease offer when the additional rental is not submitted within the 30 days.

Where Bureau of Land Management requests within 30 days the execution of special stipulations prepared by the Forest Service for acquired lands embraced in a noncompetitive oil and gas lease offer, filed over-the-counter, it may properly reject the lease offer when the special stipulations are not executed and submitted within the 30 days.

Where Bureau of Land Management requests within 30 days either (1) submission of a statement that an over-the-counter offeror for a noncompetitive oil and gas lease of acquired lands is not a partnership or (2) compliance with 43 CFR 3102.3-1 if it is a partnership, BLM may properly reject the lease offer when the offeror fails to act in either manner within the 30 days.

Hansen Brothers, 42 IBLA 40 (July 31, 1979)

An oil and gas lease offer is properly rejected where the offer is neither accompanied by a statement of corporate qualifications nor makes reference to a proper serial number of a record in which such statement had previously been filed.

Resource Exploration & Mining, Inc., 42 IBLA 63 (Aug. 2, 1979)

A simultaneous oil and gas lease offer is properly rejected where the drawing entry card is not signed or dated by the offeror.

Harley W. Adams, Timothy J. Claiborne, Sr., 42 IBLA 226 (Aug. 22, 1979)

Harley W. Adams, 43 IBLA 144 (Sept. 28, 1979)

Where a protestant against the issuance of leases, for oil and gas presents evidence demonstrating the existence of a written partnership between joint offers, and the offerors have not complied with the regulations requiring certain showings of partnerships, the offers cannot be honored.

American Quasar Petroleum Co., 42 IBLA 243 (Aug. 22, 1979)

43 CFR 3112.2-1 requires that simultaneous oil and gas drawing entry cards (DEC's) be "signed and fully executed" by the applicant or his agent which includes identifying the leasing units on the DEC's by correct parcel number. Strict compliance with the regulation is necessary and offers will be rejected where the applicant omits leading zeros from the parcel numbers on his DEC's.

Bertram F. Rudolph, Jr., 42 IBLA 310 (Aug. 29, 1979)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

Where an offer is drawn No. 1 in a simultaneous oil and gas lease drawing and the offeror is notified by BLM that the rental due is $1,955, the offer will be disqualified under 43 CFR 3112.4-1 when the offeror submits a check for $1,954 within the time required, but fails to submit the $1 deficiency within the allowed time.

C. Panos, 42 IBLA 326 (Aug. 30, 1979)

A drawing entry card which is not dated in the space provided on the card is not "fully executed," as required by 43 CFR 3112.2-1, and must be rejected.

Donald E. Monington, 42 IBLA 380 (Sept. 11, 1979)

Where BLM's decision to reject a noncompetitive lease offer is based upon a report that the findings and conclusions contained in the Management Framework Plan (MFP) for the area show that acceptance of the offer would not be in the public interest because the lease would threaten valuable wildlife, archaeological, paleontological, scenic, and recreation values, and it is subsequently revealed that the report relied upon misstated the contents of the MFP, which actually made provision for mineral leasing subject to certain protective stipulations, the decision will be reversed and remanded with instructions to issue the lease with appropriate and reasonable stipulations.

James O. Breene, Jr. (On Reconsideration), 42 IBLA 395 (Sept. 11, 1979)

A decision rejecting an oil and gas lease offer because it would result in undue degradation of the environment will be set aside where the record does not clearly support the conclusion reached by BLM.

John M. Lebfrom, 43 IBLA 67 (Sept. 19, 1979)

Where the record does not show and it does not appear that a signature on a drawing entry card is a facsimile, but rather that it is the genuine handwritten signature of the offeror, BLM's decision stating that it is a facsimile and requesting more information about the circumstances surrounding its being affixed will be vacated, as the requirements of 43 CFR 3102.6-1(a)(2) do not apply.

Hurley Gregory, 43 IBLA 82 (Sept. 19, 1979)

A simultaneously filed drawing entry card which is first drawn is properly rejected where the corporate offeror has improperly referred to the serial number where its statement of corporate qualifications was on file by omitting the letter prefix which showed which State Office had custody of the prior-filed statement of qualifications.

BLM personnel may not attempt to "correct," complete, or interpret entries on oil and gas lease offer application forms in such a way as to perfect an otherwise unacceptable application, nor may an applicant "cure" a defect on his drawing entry card by the submission of supplemental information after the drawing.

Resources Exploration & Mining, Inc. (On Reconsideration), 43 IBLA 89 (Sept. 19, 1979)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Amendments

Where an over-the-counter noncompetitive oil and gas lease offer is filed by a corporation unaccompanied by a statement of its qualifications or a reference by serial number to the record in which it has been filed, and such defect is remedied prior to the filing of any junior offer, the first offer may be considered with priority as of the date the curative data is filed.

NL Industries, Inc., 41 IBLA 38 (May 29, 1979)

Attorneys-in-Fact or Agents

Where a drawing entry card form of offer to lease a parcel of land for oil and gas is prepared by a person or corporation having discretionary authority to act on behalf of the named offeror, and the offer is signed by such agent or attorney-in-fact on behalf of the offeror, the requirements of 43 CFR 3102.6-1 apply, so that separate statements of interest by both the offeror and the agent must be filed, regardless of whether he signed his principal's name or his own name as his principal's agent or attorney-in-fact, and regardless of whether the signature was applied manually or mechanically.

Gertrude H. D'Amico, 39 IBLA 68 (Jan. 17, 1979)

H. R. Delasco, Inc., et al., 39 IBLA 194 (Feb. 2, 1979)

J. A. Masek, 40 IBLA 123 (Mar. 27, 1979)

Blanche V. White, 40 IBLA 152 (Mar. 30, 1979)

Under 30 U.S.C. § 226 (1976), the Department has no authority to issue an oil and gas lease to other than the first-qualified applicant, and if an agent signs an offer for an applicant, the applicant cannot be considered qualified unless the statements required by 43 CFR 3102.6-1 have been timely filed.

Where a rubber stamp is used to imprint an applicant's signature, and where no agent's statement has been submitted under 43 CFR 3102.6-1, a State Office may take appropriate action to establish whether the applicant's signature was imprinted at his request and whether he formulated the offer.

Killian L. Huger, Jr., 39 IBLA 332 (Feb. 27, 1979)

A successful drawee in a simultaneous oil and gas lease drawing will not be disqualified to receive a lease because of an allegation that his leasing service has failed to observe the registration requirements of the Securities Act of 1933.

D. E. Pack, 40 IBLA 45 (Mar. 15, 1979)

The applicability of 43 CFR 3102.6-1 governing agents is far less certain where the agent is the offeror and is also the agent of the other interested parties who will ultimately hold the entire lease interest, as no provision of the regulation unambiguously requires the agent in these circumstances to show that he has authority to sign his own name as offeror.

Robert R. Brambley, 40 IBLA 215 (Apr. 10, 1979)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Attorneys-in-Fact or Agents--Continued

Where a drawing entry card offer to lease is prepared by an agent, that is, a person or corporation having discretionary authority to act on behalf of the named offeror, and the offer is signed by such agent on behalf of the offeror, the requirements of 43 CFR 3102.6-1 apply, so that separate statements of interest by both the offeror and the agent must be filed, regardless of whether the latter signed his principal's name or his own name as his principal's agent, and regardless of whether the signature was applied manually or mechanically.

L. M. Dunn, 40 IBLA 335 (May 8, 1979)

Where there is no evidence in the record that the offeror with first priority in a simultaneous oil and gas lease drawing is not the sole party in interest, a protest alleging an interest in a filing service may properly be dismissed.

Charges that an oil and gas lease filing service has not complied with the Securities Act of 1933 are properly raised before the Securities and Exchange Commission rather than the Department of the Interior, which has not been delegated responsibility for enforcement of securities laws.

Joseph J. O'Keefe, 40 IBLA 378 (May 14, 1979)

Where separate statements of interest are required pursuant to 43 CFR 3102.6-1(a)(2) (1977), this Board must affirm the dismissal of a protest against the issuance of an oil and gas lease which is premised on the protestant's contention that the statement of the offeror must bear his original, holographic signature.

Although a lease offer may not be rejected solely because an agent affixed the offeror's facsimile signature to the offeror's separate statement, this does not prevent BLM from requiring that the offeror personally verify the information contained therein and provide whatever supplemental information may reasonably be required. A private agent may not interpose himself between a lease applicant and the Government so as to mask the identity of the applicant and prevent direct contact by Federal officials who are properly concerned.

W. H. Gilmore, 41 IBLA 25 (May 29, 1979)

It is not proper to reject a drawing entry card oil and gas lease offer solely because an agent affixed the offeror's facsimile signature to both the DEC and to the offeror's separate statement required by 43 CFR 3102.6-1, as BLM may require that the offeror personally verify the information contained in the offer and in the statement, and provide whatever supplemental information that BLM may reasonably require.

Robert B. Coen et al., 41 IBLA 55 (May 31, 1979)

An offeror who submits a drawing entry card signed on his behalf by his agent leasing service meets the requirements of 43 CFR 3102.6-1 if satisfactory agency statements by him and his agent, such statements bearing a facsimile signature, are submitted along with his offer card.

"Interest." Where there is an agreement giving an offeror the option of selling part of an oil and gas lease to his agent leasing service, exercisable solely at the offeror's discretion, the agent has a mere hope or expectancy and not an "interest" in the offer, as

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Attorneys-in-Fact or Agents--Continued

defined in 43 CFR 3100.0-5(b). A leasing service, which files a simultaneous noncompetitive oil and gas lease offer drawing entry card on behalf of its client, bound by a "put option" does not have a hidden interest in the offer and does not violate 43 CFR 3102.7 by failing to disclose this put option or 43 CFR 3112.5-2 by filing offers for more than one client on a parcel.

Where there is no evidence in the administrative record that the offeror with first priority in a drawing of simultaneous noncompetitive oil and gas lease offers is not the sole party in interest, as stated by both the offeror and his agent, the burden is on a protestant attacking the validity of the offer to present evidence of an accusation that the offeror/agent agreement gives the agent an enforceable interest in the lease to be issued.

Jack Mask, 41 IBLA 147 (June 18, 1979)

Kelley Everette, 41 IBLA 155 (June 18, 1979)

A decision by BLM rejecting a noncompetitive oil and gas lease drawing entry card offer because someone other than the offeror affixed a facsimile of the offeror's signature on the card and agency statements were not filed as required by 43 CFR 3102.6-1 will be vacated where BLM bases its finding to this effect on a statement made by the offeror 6 months previously concerning the preparation of other, earlier offers, and where the offeror alleges on appeal that she actually affixed the facsimile herself on the offer in question.

Miriam Keizman (Harper), 41 IBLA 166 (June 18, 1979)

A handwritten signature may be presumed to be written by the person named. Where an attorney-in-fact or an agent does not sign a drawing entry card, the provisions of 43 CFR 3102.6-1 are not invoked.

The fact that the addresses of the lease offeror and a filing service are identical merely indicates the use of a filing service and does not in itself give the offeror or agent a greater probability of successfully obtaining a lease or interest therein in violation of 43 CFR 3112.5-2.

Where there is no evidence of any violation of the regulations in the record, the burden is on the protestant to submit competent evidence of an accusation that there is an agreement giving a filing service an enforceable interest in the lease, absent which the protest is properly rejected. Allegations that there was a contract between the offeror and a filing service in which the filing service withholds an overriding royalty interest from the offeror and participates in the proceeds, without evidence, is not sufficient to show that the offeror was not a sole party in interest.

J. Theodore Ellis, D. E. Pack, 41 IBLA 231 (June 27, 1979)

Where oil and gas lease offerors enclose agency statements with their drawing entry cards, which statements are clearly intended to, and appear to, apply to their offers, their cards are fully executed notwithstanding their failure to note on the face of the cards that the agency statements are enclosed, as nothing in the regulations or on the card directs an offeror to do so.

Nothing in the regulations requires an agency statement submitted under 43 CFR 3102.6-1(a) to be dated. Rather, the statement is an adjunct to the drawing entry card

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Attorneys-in-Fact or Agents--Continued

and is considered dated as of the signing and dating of the card.

An agency statement required by 43 CFR 3102.6-1(a) need not be holographically signed. Rather, such statements may be submitted over facsimile signatures.

Frederick T. Peters et al., 41 IBLA 262 (June 28, 1979)

Where the record does not show and it does not appear that a signature on a drawing entry card is a facsimile, but rather that it is the genuine handwritten signature of the offeror, BLM's decision stating that it is a facsimile and requesting more information about the circumstances surrounding its being affixed will be vacated, as the requirements of 43 CFR 3102.6-1(a)(2) do not apply.

Hurley Gregory, 43 IBLA 82 (Sept. 19, 1979)

Drawings

A protest against the issuance of an oil and gas lease is properly dismissed where it is based on vague allegations of impropriety in a relationship between a leasing service and its client and is unsupported by facts showing that the successful drawee should have been disqualified, as the protestant has failed to meet his burden of showing with competent evidence that there has been a violation of applicable regulations which would disqualify the offer.

Geosearch, Inc., 39 IBLA 49 (Jan. 16, 1979)

Geosearch, Inc., 40 IBLA 267 (Apr. 18, 1979)

Where a drawing entry card form of offer to lease a parcel of land for oil and gas is prepared by a person or corporation having discretionary authority to act on behalf of the named offeror, and the offer is signed by such agent or attorney-in-fact on behalf of the offeror, the requirements of 43 CFR 3102.6-1 apply, so that separate statements of interest by both the offeror and the agent must be filed, regardless of whether he signed his principal's name or his own name as his principal's agent or attorney-in-fact, and regardless of whether the signature was applied manually or mechanically.

Gertrude H. D'Amico, 39 IBLA 68 (Jan. 17, 1979)

H. R. Delasco, Inc., et al., 39 IELA 194 (Feb. 2, 1979)

J. A. Masek, 40 IBLA 123 (Mar. 27, 1979)

Blanche V. White, 40 IBLA 152 (Mar. 30, 1979)

Under 43 CFR 3112.1-2, if an offeror wishes to participate in a simultaneous drawing procedure, the drawing entry card must be received in the local Bureau of Land Management office within the time allotted therefor.

Bertram F. Rudolph, Jr., 39 IBLA 78 (Jan. 24, 1979)

Where the Director, Bureau of Land Management, has specified which kinds of discrepancies will result in the exclusion of drawing entry cards from a drawing of simultaneously filed oil and gas lease offers, and

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Drawings--Continued

directs that all other cards are to be included in the drawings, the action of one field office to exclude certain other types of cards will be reversed as being in contravention of such directive.

Oil and gas drawing entry cards may not be excluded from a drawing for trivial and inconsequential alterations which do not affect the appearance or feel of the cards in any significant way and which were not intended to adversely affect the integrity of the drawing.

Helen E. Serencha, 39 IBLA 318 (Feb. 23, 1979)

Under 30 U.S.C. § 226 (1976), the Department has no authority to issue an oil and gas lease to other than the first-qualified applicant, and if an agent signs an offer for an applicant, the applicant cannot be considered qualified unless the statements reguired by 43 CFR 3102.6-1 have been timely filed.

Where a rubber stamp is used to imprint an applicant's signature, and where no agent's statement has been submitted under 43 CFR 3102.6-1, a State Office may take appropriate action to establish whether the applicant's signature was imprinted at his reguest and whether he formulated the offer.

Killian L. Huger, Jr., 39 IBLA 332 (Feb. 27, 1979)

A first-drawn simultaneous drawing entry card which is defective because of noncompliance with a mandatory regulation must be rejected and may not be cured after the drawing is held.

Elizabeth Pagedas (On Reconsideration), 40 IBLA 21 (Mar. 9, 1979)

An offeror's use of a leasing service's address on a simultaneous noncompetitive oil and gas lease offer drawing entry card does not disqualify the offer. A leasing service bound by a "put option" does not have a hidden interest in the offer and does not violate 43 CFR 3102.7 by failing to disclose this put option or 43 CFR 3112.5-2 by filing offers for more than one client on a parcel.

D. E. Pack, 40 IBLA 45 (Mar. 15, 1979)

Where a drawing entry card is submitted in a simultaneous oil and gas lease drawing and signed by multiple offerors, the offer is properly rejected if even a single offeror fails to enter the date of his signature on the drawing entry card.

The requirement set forth in 43 CFR 3112.2-1(a) (1977) that a drawing entry card be fully executed is not vague or unclear. Hence, a DEC signed by multiple offerors is properly rejected if even a single offeror fails to enter the date on the drawing entry card.

The date of each signature on a drawing entry card is important, because it shows that on that particular date, the offerors, by their respective signatures, certify, as to each, all the statements made on the card.

Thomas R. Flickinger, William S. Flickinger, et al., 40 IBLA 53 (Mar. 16, 1979)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Drawings--Continued

An entry card in a simultaneous oil and gas lease drawing need not be rejected under 43 CFR 3112.2-1(a) where the State prefix of the parcel number is placed on the card immediately below the boxes provided for designation of the parcel number.

L. Alice Collister, 40 IBLA 71 (Mar. 16, 1979)

The first-drawn entry card of a corporation which has failed to comply with the regulations governing qualifications must be rejected.

University of the Trees, 40 IBLA 74 (Mar. 16, 1979)

Where, in a drawing of simultaneously filed noncompetitive oil and gas lease offers, an offer is filed by a trustee on behalf of a minor child, and another offer for the same land is filed by the parent of that child, and the parent has an interest in the child's offer, this interest effectively gives the parent greater chances of success in the drawing and is inherently unfair, regardless of whether there has been collusion or intent to deceive the Department.

Where separate trusts are created for siblings, and the trust agreements provide for a contingent distribution of the assets from the estate of one or more trusts of decedents into the trust estates of the survivors, each of the beneficiaries of the separate trusts has an "interest" in any oil and gas lease or offer as that term is defined in 43 CFR 3100.0-5(b), and the simultaneous filing of lease offers by more than one such trust for the same parcel is therefore violative of the regulation which prohibits the filing of multiple offers. 43 CFR 3112.5-2.

Farrell L. Lines (Trustee) and Winston Trust, 40 IBLA 91 (Mar. 27, 1979)

A drawing entry card in a simultaneous oil and gas lease filing need not be rejected where the card sets out as part of the parcel designation the complete name of the State in which the parcel is located instead of the abbreviated State code prefix.

Ed Pendlaton, 40 IBLA 103 (Mar. 27, 1979)

Unsigned and undated drawing entry cards filed in the simultaneous oil and gas leasing drawings must be rejected. The calling out of the No. 1 drawee's name does not constitute acceptance of the offer. Acceptance of the offer cannot occur until the lease itself has been executed by the appropriate official of the Government.

Darrell L. Sekin, 40 IBLA 156 (Mar. 30, 1979)

A drawing entry card which is not dated in the space provided on the card is not "fully executed," as required by 43 CFR 3112.2-1, and must be rejected, notwithstanding an allegation that the date of signing might have been deduced from a check accompanying the offer or from the postmark of the envelope in which the offer was submitted.

Donald Miller, 40 IBLA 193 (Apr. 5, 1979)

Donald Miller, 43 IBLA 4 (Sept. 11, 1979)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Drawings--Continued

Established and longstanding Departmental policy relating to the administration of the simultaneous oil and gas leasing system, premised upon regulatory interpretation, is binding on all employees of the Bureau of Land Management, until such time as it is properly changed.

The essential requirement of the simultaneous oil and gas leasing system is that all properly filed offers be afforded equal opportunity to obtain a lease. Where a system effectively excludes a lease offer from consideration, such a system is arbitrary and capricious.

Milton D. Feinberg, Benson J. Lamp (On Reconsideration), 40 IBLA 222 (Apr. 11, 1979) 86 I.D. 234

Where a drawing entry card is submitted in a simultaneous oil and gas lease drawing and signed by multiple offerors, the offer is properly rejected if even a single offeror fails to enter the date of his signature on the drawing entry card.

The requirement set forth in 43 CFR 3112.2-1(a) that a drawing entry card be fully executed is not vague or unclear. Hence, a DEC signed by multiple offerors is properly rejected if even a single offeror fails to enter the date on the drawing entry card.

Pamela W. Kay, Henry H. Greer, Gregory Montgomery, Franklin J. Sands, 40 IBLA 240 (Apr. 16, 1979)

A first-drawn simultaneous drawing entry card which is defective because of noncompliance with a mandatory regulation must be rejected and may not be "cured" by submission of further information.

Charles J. King, 40 IBLA 276 (Apr. 18, 1979)

Resource Exploration & Mining, Inc., 42 IBLA 63 (Aug. 2, 1979)

Herbert Adler, 42 IBLA 228 (Aug. 22, 1979)

Where a drawing entry card offer to lease is prepared by an agent, that is, a person or corporation having discretionary authority to act on behalf of the named offeror, and the offer is signed by such agent on behalf of the offeror, the requirements of 43 CFR 3102.6-1 apply, so that separate statements of interest by both the offeror and the agent must be filed, regardless of whether the latter signed his principal's name or his own name as his principal's agent, and regardless of whether the signature was applied manually or mechanically.

L. M. Dunn, 40 IBLA 335 (May 8, 1979)

The fact that the addresses of an oil and gas lease offeror and a filing service are identical does not disqualify the offer or afford the offeror or filing service a greater probability of successfully obtaining a lease or interest therein in violation of 43 CFR 3112.5-2.

Where there is no evidence in the record that the offeror with first priority in a simultaneous oil and gas lease drawing is not the sole party in interest, a protest alleging an interest in a filing service may properly be dismissed.

Joseph J. O'Keefe, 40 IBLA 378 (May 14, 1979)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Drawings--Continued

A first-drawn simultaneous drawing entry card which is defective because of noncompliance with a mandatory regulation must be rejected and may not be "cured" by subsequent actions.

Frederick W. Lowey et al., 40 IBLA 381 (May 14, 1979)

Where BLM does not reject simultaneous noncompetitive oil and gas lease offers drawn with second priority after the issuance of the leases to the first drawees, the second drawees retain an interest which must be considered if the leases are canceled because the first drawees' offers are defective, provided that the leases have not been assigned to bona fide purchasers. In those circumstances, BLM's decision dismissing the second drawees' protests against the continued validity of these leases for lack of interest must be vacated.

Geosearch, Inc., 40 IBLA 397 (May 14, 1979)

Geosearch, Inc., 41 IBLA 291 (June 28, 1979)

When a person files two oil and gas lease offers for a single parcel in the simultaneous oil and gas leasing procedure, as a joint applicant with the spouse, the applicable regulation, 43 CFR 3112.2-1(a)(2), requires rejection of both offers, regardless of the order in which the names of the two spouses are listed on the two cards.

Maurine E. and Howard B. Pettibon, 41 IBLA 23 (May 22, 1979)

Where separate statements of interest are required pursuant to 43 CFR 3102.6-1(a)(2) (1977), this Board must affirm the dismissal of a protest against the issuance of an oil and gas lease which is premised on the protestant's contention that the statement of the offeror must bear his original, holographic signature.

Although a lease offer may not be rejected solely because an agent affixed the offeror's facsimile signature to the offeror's separate statement, this does not prevent BLM from requiring that the offeror personally verify the information contained therein and provide whatever supplemental information may reasonably be required. A private agent may not interpose himself between a lease applicant and the Government so as to mask the identity of the applicant and prevent direct contact by Federal officials who are properly concerned.

W. H. Gilmore, 41 IBLA 25 (May 29, 1979)

It is not proper to reject a drawing entry card oil and gas lease offer solely because an agent affixed the offeror's facsimile signature to both the DEC and to the offeror's separate statement required by 43 CFR 3102.6-1, as BLM may require that the offeror personally verify the information contained in the offer and in the statement, and provide whatever supplemental information that BLM may reasonably require.

Where a drawing entry card is submitted in a simultaneous oil and gas lease drawing and is signed by multiple offerors, the offer is properly rejected if even a single offeror fails to enter the date of his signature on the drawing entry card.

Robert B. Coen et al., 41 IBLA 55 (May 31, 1979)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Drawings--Continued

Strict compliance with 43 CFR 3112.2-1 which provides that simultaneous oil and gas drawing entry cards be signed and fully executed by an applicant or his agent is required.

A simultaneous oil and gas lease offer is properly rejected where the State prefix to the parcel number on an oil and gas drawing entry card is omitted.

A simultaneous oil and gas lease offer is properly rejected where the drawing entry card is not dated.

C. H. Coster Gerard, 41 IBLA 74 (May 31, 1979)

Strict compliance with 43 CFR 3112.2-1, which provides that simultaneous oil and gas drawing entry cards be signed and fully executed by an applicant or his agent, is required. Where no date of signing appears on an entry card, the offer is properly rejected.

The burden of signing and fully executing a drawing entry card rests on the applicant. Reliance on instructions provided by a non-governmental filing service does not excuse the failure to fully execute a card.

Walter B. Moore, Jr., 41 IBLA 95 (June 4, 1979)

When, in a drawing of simultaneously filed oil and gas lease offers, the first-drawn offeror is notified to submit the first year's advance rental, that rental must be received by the proper office within the prescribed 15 days. Automatic disqualification, stemming from failure to pay timely, will not be avoided by allegations that payment was mailed far enough in advance to arrive at BLM timely.

American Petrofina Co. of Texas, 41 IBLA 126 (June 13, 1979)

An offeror who submits a drawing entry card signed on his behalf by his agent leasing service meets the requirements of 43 CFR 3102.6-1 if satisfactory agency statements by him and his agent, such statements bearing a facsimile signature, are submitted along with his offer card.

"Interest." Where there is an agreement giving an offeror the option of selling part of an oil and gas lease to his agent leasing service, exercisable solely at the offeror's discretion, the agent has a mere hope or expectancy and not an "interest" in the offer, as defined in 43 CFR 3100.0-5(b). A leasing service, which files a simultaneous noncompetitive oil and gas lease offer drawing entry card on behalf of its client, bound by a "put option" does not have a hidden interest in the offer and does not violate 43 CFR 3102.7 by failing to disclose this put option or 43 CFR 3112.5-2 by filing offers for more than one client on a parcel.

Where there is no evidence in the administrative record that the offeror with first priority in a drawing of simultaneous noncompetitive oil and gas lease offers is not the sole party in interest, as stated by both the offeror and his agent, the burden is on a protestant attacking the validity of the offer to present evidence of an accusation that the offeror/agent agreement gives the agent an enforceable interest in the lease to be issued.

Jack Mask, 41 IBLA 147 (June 18, 1979)

Kelley Everette, 41 IBLA 155 (June 18, 1979)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Drawings--Continued

A decision by BLM rejecting a noncompetitive oil and gas lease drawing entry card offer because someone other than the offeror affixed a facsimile of the offeror's signature on the card and agency statements were not filed as required by 43 CFR 3102.6-1 will be vacated where BLM bases its finding to this effect on a statement made by the offeror 6 months previously concerning the preparation of other, earlier offers, and where the offeror alleges on appeal that she actually affixed the facsimile herself on the offer in question.

Miriam Keizman (Harper), 41 IBLA 166 (June 18, 1979)

A handwritten signature may be presumed to be written by the person named. Where an attorney-in-fact or an agent does not sign a drawing entry card, the provisions of 43 CFR 3102.6-1 are not invoked.

The fact that the addresses of the lease offeror and a filing service are identical merely indicates the use of a filing service and does not in itself give the offeror or agent a greater probability of successfully obtaining a lease or interest therein in violation of 43 CFR 3112.5-2.

Where there is no evidence of any violation of the regulations in the record, the burden is on the protestant to submit competent evidence of an accusation that there is an agreement giving a filing service an enforceable interest in the lease, absent which the protest is properly rejected. Allegations that there was a contract between the offeror and a filing service in which the filing service withholds an overriding royalty interest from the offeror and participates in the proceeds, without evidence, is not sufficient to show that the offeror was not a sole party in interest.

Where the purchaser of an oil and gas lease asserts that he purchased the lease from the offeror whose drawing entry card was drawn with first priority, for cash consideration without knowledge of any irregularities or violation of the regulations, he is considered to be a bona fide purchaser, and his lease is not subject to cancellation unless prima facie evidence is presented to the contrary.

J. Theodore Ellis, D. E. Pack, 41 IBLA 231 (June 27, 1979)

Where oil and gas lease offerors enclose agency statements with their drawing entry cards, which statements are clearly intended to, and appear to, apply to their offers, their cards are fully executed notwithstanding their failure to note on the face of the cards that the agency statements are enclosed, as nothing in the regulations or on the card directs an offeror to do so.

Nothing in the regulations requires an agency statement submitted under 43 CFR 3102.6-1(a) to be dated. Rather, the statement is an adjunct to the drawing entry card and is considered dated as of the signing and dating of the card.

An agency statement required by 43 CFR 3102.6-1(a) need not be holographically signed. Rather, such statements may be submitted over facsimile signatures.

Frederick T. Peters et al., 41 IBLA 262 (June 28, 1979)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Drawings--Continued

It is proper to reject a drawing entry card lease offer, given first priority at a drawing, where the name of the offeror is affixed to the card first name, middle initial, last name, not in the appropriate spaces, by means of a rubber stamp, instead of being inserted in the appropriate spaces of the card in this order: last name, first name, middle initial.

Gordon N. Blair, 41 IBLA 288 (June 28, 1979)

When an offer for a noncompetitive oil and gas lease is submitted by the trustee of a discretionary trust and an offer for the same parcel is submitted by the beneficiary of that trust, a multiple filing has occurred contrary to 43 CFR 3112.5-2 (1978). The "agreement, scheme, or plan" specified by this regulation need not exist between the trustee and the beneficiary of the trust. A plan or agreement, such as the provisions of a trust, whose purpose is to benefit a third party is sufficient to come within the meaning of the regulation.

James H. Turner (Trustee), Sara Ann Lawrence Trust, 41 IBLA 360 (July 20, 1979)

A first-drawn entry card creates no vested right therein; the offeror gains merely a right of priority in consideration. The Department is authorized to accept only the offer of the first-qualified applicant, one who has fully complied with all mandatory regulations.

Harry A. Zuckerman et al., 41 IBLA 372 (July 23, 1979)

Where offers for the same parcel of land are filed by two corporations in a simultaneous oil and gas lease drawing, and where the directors of the first corporation having authority to file offers and execute leases are directors of the second with the same authority and the surrounding circumstances suggest that the corporations are interrelated, the drawing is inherently unfair and the offers are properly rejected as a prohibited multiple filing. Collusion or intent to deceive the Department need not be shown.

June Oil and Gas, Inc., Cook Oil and Gas, Inc., 41 IBLA 394 (July 24, 1979) 86 I.D. 374

An oil and gas lease may be awarded to the first-qualified applicant only. The regulations governing qualifications are mandatory, and strict compliance therewith is required.

A defective drawing card offer for an oil and gas lease is not curable by submission of required evidence of qualifications after the drawing, for the reason that the rights of the second- and third-drawn qualified offerors have intervened. Where appellant's offer was third drawn and eventually accorded priority and then ultimately disqualified, the parcel described therein must be included in a subsequent list of lands available for simultaneous filing.

Don C. Bell II (Trustee), 42 IBLA 21 (July 25, 1979)

A simultaneous oil and gas lease offer is properly rejected where the drawing entry card is not signed or dated by the offeror.

Harley W. Adams, Timothy J. Claiborne, Sr., 42 IBLA 226 (Aug. 22, 1979)

Harley W. Adams, 43 IBLA 144 (Sept. 28, 1979)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Drawings--Continued

Where an offeror submits two drawing entry cards on a parcel, both cards are properly disqualified. It is irrelevant that there was actually only one card in the drawing due to BLM's rejection of the other, before the drawing, as defective for another reason, as it is the submission of more than one card per parcel which is prohibited under 43 CFR 3112.2-1(a)(2).

Mae R. Colvin, 42 IBLA 266 (Aug. 27, 1979)

43 CFR 3112.2-1 requires that simultaneous oil and gas drawing entry cards (DEC's) be "signed and fully executed" by the applicant or his agent which includes identifying the leasing units on the DEC's by correct parcel number. Strict compliance with the regulation is necessary and offers will be rejected where the applicant omits leading zeros from the parcel numbers on his DEC's.

Bertram F. Rudolph, Jr., 42 IBLA 310 (Aug. 29, 1979)

A drawing entry card which is not dated in the space provided on the card is not "fully executed," as required by 43 CFR 3112.2-1, and must be rejected.

Donald E. Monington, 42 IBLA 380 (Sept. 11, 1979)

A simultaneously filed drawing entry card which is first drawn is properly rejected where the corporate offeror has improperly referred to the serial number where its statement of corporate qualifications was on file by omitting the letter prefix which showed which State Office had custody of the prior-filed statement of qualifications.

BLM personnel may not attempt to "correct," complete, or interpret entries on oil and gas lease offer application forms in such a way as to perfect an otherwise unacceptable application, nor may an applicant "cure" a defect on his drawing entry card by the submission of supplemental information after the drawing.

Resources Exploration & Mining, Inc. (On Reconsideration), 43 IBLA 89 (Sept. 19, 1979)

Filing

The instructions printed on the simultaneous drawing entry card plainly advise that "[c]ompliance must also be made with the provisions of 43 CFR 3102." It is solely the responsibility of the offeror to ascertain what is contained in the regulations in order to comply therewith.

Not all persons may be qualified to be lessees, and for that reason all offerors must furnish evidence of their qualifications to hold oil and gas leases. In the case of corporations, such evidence must accompany the offer unless previously submitted, in which case reference to the serial number of the record suffices.

Appellant's request that it be permitted to furnish the evidence of qualifications on appeal is denied. In simultaneous oil and gas leasing, the only difference between the drawing entry cards is the order in which they are drawn. The applications are considered to have been simultaneously made. Giving an unqualified first-drawn entrant additional time to file infringes on the rights of the second-drawn qualified offeror.

University of the Trees, 40 IBLA 74 (Mar. 16, 1979)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Filing--Continued

Where separate statements of interest are required pursuant to 43 CFR 3102.6-1(a)(2) (1977), this Board must affirm the dismissal of a protest against the issuance of an oil and gas lease which is premised on the protestant's contention that the statement of the offeror must bear his original, holographic signature.

Although a lease offer may not be rejected solely because an agent affixed the offeror's facsimile signature to the offeror's separate statement, this does not prevent BLM from requiring that the offeror personally verify the information contained therein and provide whatever supplemental information may reasonably be required. A private agent may not interpose himself between a lease applicant and the Government so as to mask the identity of the applicant and prevent direct contact by Federal officials who are properly concerned.

W. H. Gilmore, 41 IBLA 25 (May 29, 1979)

It is not proper to reject a drawing entry card oil and gas lease offer solely because an agent affixed the offeror's facsimile signature to both the DEC and to the offeror's separate statement required by 43 CFR 3102.6-1, as BLM may require that the offeror personally verify the information contained in the offer and in the statement, and provide whatever supplemental information that BLM may reasonably require.

Robert B. Coen et al., 41 IBLA 55 (May 31, 1979)

Where oil and gas lease offerors enclose agency statements with their drawing entry cards, which statements are clearly intended to, and appear to, apply to their offers, their cards are fully executed notwithstanding their failure to note on the face of the cards that the agency statements are enclosed, as nothing in the regulations or on the card directs an offeror to do so.

Nothing in the regulations requires an agency statement submitted under 43 CFR 3102.6-1(a) to be dated. Rather, the statement is an adjunct to the drawing entry card and is considered dated as of the signing and dating of the card.

An agency statement required by 43 CFR 3102.6-1(a) need not be holographically signed. Rather, such statements may be submitted over facsimile signatures.

Frederick T. Peters et al., 41 IBLA 262 (June 28, 1979)

Not all persons may be qualified to be lessees. Signing and dating the entry card constitute certification by the offeror of his qualifications as of a date certain.

As used in 43 CFR 3112.2-1, the term "fully executed" means that the applicant must, in order to render the entry card a valid and complete offer to lease, supply the information requested thereon, including the date.

Harry A. Zuckerman et al., 41 IBLA 372 (July 23, 1979)

Where offers for the same parcel of land are filed by two corporations in a simultaneous oil and gas lease drawing, and where the directors of the first corporation having authority to file offers and execute leases are directors of the second with the same authority and the surrounding circumstances suggest that the corporations are interrelated, the drawing is inherently unfair and the offers are properly rejected as a prohibited

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Filing--Continued

multiple filing. Collusion or intent to deceive the Department need not be shown.

June Oil and Gas, Inc., Cook Oil and Gas, Inc., 41 IBLA 394 (July 24, 1979) 86 I.D. 374

An offeror for oil and gas lease may withdraw his offer at any time prior to the drawing. However, the filing fee is retained as a service charge irrespective of the outcome of the drawing.

Don C. Bell II (Trustee), 42 IBLA 21 (July 25, 1979)

Where an offeror submits two drawing entry cards on a parcel, both cards are properly disqualified. It is irrelevant that there was actually only one card in the drawing due to BLM's rejection of the other, before the drawing, as defective for another reason, as it is the submission of more than one card per parcel which is prohibited under 43 CFR 3112.2-1(a)(2).

Mae R. Colvin, 42 IBLA 266 (Aug. 27, 1979)

Legibility

When an applicant for a noncompetitive oil and gas lease is requested to provide additional information for the adjudication of his drawing entry card offer, the offer is properly rejected where the evidence provided is illegible, and applicant was notified of the illegibility but responded by sending more illegible evidence.

Richard P. Lewis, 40 IBLA 100 (Mar. 27, 1979)

Reinstatement

A noncompetitive oil and gas lease offer for acquired lands, filed "over-the-counter," is properly rejected when the accompanying rental payment is deficient by more than 10 percent. However, where the balance of the rental is tendered with the notice of appeal, the offer may be reinstated with priority from the date the deficiency was corrected.

George S. Swan, 39 IBLA 47 (Jan. 16, 1979)

640-acre Limitation

No offer may be made for less than 640 acres except where the offer is accompanied by a showing that the lands are in an approved unit or cooperative plan of operation, or where the land is surrounded by lands not available for leasing, and where these circumstances do not exist an offer for less than 640 acres is properly rejected.

"Lands not available for leasing." Under 43 CFR 3110.1-3(a), lands are deemed to be not available for leasing when they are surrounded by lands contained within patents with no oil and gas rights reserved to the United States, when they are segregated from oil and gas leasing by withdrawal, or are embraced within an outstanding lease with an effective issuance date prior to the filing date of the subject offer.

Helen E. Reid, 39 IBLA 378 (Feb. 28, 1979)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

640-acre Limitation--Continued

Under 43 CFR 3110.1-3, it is improper to reject an oil and gas lease offer filed for more than 640 acres of available land where leases subsequently issued in response to prior applications have reduced the land available to the subject application to less than 640 acres.

Melvin Wolf, 43 IBLA 128 (Sept. 26, 1979)

Sole Party in Interest

"Interest." Where an oil and gas leasing service selects lands, files offers, and advances funds on behalf of its clients for leases which the service is willing to sell on behalf of any successful client, strictly at the client's option, in return for a percentage commission on the sale, the service has no enforceable right to any portion of the lease, if issued. In such circumstances, the service does not have an "interest" in the lease, so that the client/offeror is not precluded from stating that he is the sole party in interest to the offer, and the filing of offers for the same parcel by other clients of the service is not disqualifying.

Geosearch, Inc., 39 IBLA 49 (Jan. 16, 1979)

Geosearch, Inc., 40 IBLA 267 (Apr. 18, 1979)

Geosearch, Inc., 40 IBLA 401 (May 14, 1979)

The fact that the addresses of an oil and gas lease offeror and a filing service are identical does not disqualify the offer or afford the offeror or filing service a greater probability of successfully obtaining a lease or interest therein in violation of 43 CFR 3112.5-2.

Where there is no evidence in the record that the offeror with first priority in a simultaneous oil and gas lease drawing is not the sole party in interest, a protest alleging an interest in a filing service may properly be dismissed.

Joseph J. O'Keefe, 40 IBLA 378 (May 14, 1979)

When an individual files an oil and gas lease offer through a leasing service under a contractual agreement whereby the leasing service is authorized to act as the sole and exclusive agent to negotiate for sublease, assignment, or sale of any rights obtained by the offeror; where the offeror is required to pay the leasing service a commission according to a set schedule on any sale plus a percentage of any royalties, even if the offeror negotiates the sale; and where such agency to negotiate is to be valid for 5 years, the leasing service has an enforceable right to share in the proceeds of any sale of the lease or any interest therein. Such an agreement creates for the leasing service an "interest" in the lease as that term is defined in 43 CFR 3100.0-5(b).

A purported disclaimer by a leasing service of its interests in its clients' offers which is filed with BLM prior to the filing of these offers, but which, by its own terms, does not apply to the interests held by the service in these offers, is ineffectual and does not erase these interests. This disclaimer is also ineffectual as a matter of law even as to a client's offer to which it does apply, where it is unsupported by consideration and where it is not communicated to the client, as it may be retracted by the service. The service's interests in these offers therefore remain extant as of the filing of its clients' offers, notwithstanding the purported disclaimer, and where the

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Sole Party in Interest--Continued

existence of its interests is not disclosed on the offer cards as required by 43 CFR 3102.7, BLM properly rejects the offers.

Frederick W. Lowey et al., 40 IBLA 381 (May 14, 1979)

"Interest." Where there is an agreement giving an offeror the option of selling part of an oil and gas lease to his agent leasing service, exercisable solely at the offeror's discretion, the agent has a mere hope or expectancy and not an "interest" in the offer, as defined in 43 CFR 3100.0-5(b). A leasing service, which files a simultaneous noncompetitive oil and gas lease offer drawing entry card on behalf of its client, bound by a "put option" does not have a hidden interest in the offer and does not violate 43 CFR 3102.7 by failing to disclose this put option or 43 CFR 3112.5-2 by filing offers for more than one client on a parcel.

Where there is no evidence in the administrative record that the offeror with first priority in a drawing of simultaneous noncompetitive oil and gas lease offers is not the sole party in interest, as stated by both the offeror and his agent, the burden is on a protestant attacking the validity of the offer to present evidence of an accusation that the offeror/agent agreement gives the agent an enforceable interest in the lease to be issued.

Jack Mask, 41 IBLA 147 (June 18, 1979)

Kelley Everette, 41 IBLA 155 (June 18, 1979)

The fact that the addresses of the lease offeror and a filing service are identical merely indicates the use of a filing service and does not in itself give the offeror or agent a greater probability of successfully obtaining a lease or interest therein in violation of 43 CFR 3112.5-2.

Where there is no evidence of any violation of the regulations in the record, the burden is on the protestant to submit competent evidence of an accusation that there is an agreement giving a filing service an enforceable interest in the lease, absent which the protest is properly rejected. Allegations that there was a contract between the offeror and a filing service in which the filing service withholds an overriding royalty interest from the offeror and participates in the proceeds, without evidence, is not sufficient to show that the offeror was not a sole party in interest.

J. Theodore Ellis, D. E. Pack, 41 IBLA 231 (June 27, 1979)

An oil and gas lease offer filed on a simultaneous filing drawing entry card must be rejected if it contains the names of additional parties in interest, and there is a failure to file the statement of their interests, the agreement between the parties, and the evidence of their qualifications within the time required by 43 CFR 3102.7.

Herbert Adler, 42 IBLA 228 (Aug. 22, 1979)

A protest by a junior offeror against an oil and gas lease offer which charges that fraudulent statements were made on the offer and implies other wrongdoing that violates the regulation requiring disclosure of all parties in interest is properly dismissed where the protestant fails to establish these charges or that the successful offer was in fact defective. A

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Sole Party in Interest--Continued

suggestion of the possibility of a violation of a regulation is not sufficient; a protestant must present competent proof of such violation, absent which a protest is properly rejected.

Arjay Oil Co., 43 IBLA 98 (Sept. 20, 1979)

ASSIGNMENTS OR TRANSFERS

A corporate applicant for assignment of an oil and gas lease must file statements required by 43 CFR 3102.4-1 with its application or, if already filed, so indicate by reference to the serial number of the Bureau of Land Management record in which such information is available.

Although deficiencies in an application for assignment of an oil and gas lease may be timely cured, 30 U.S.C. § 187a (1976) specifies the time when an assignment is effective, and no assignment can be approved for a terminated oil and gas lease.

An oil and gas lease may be relinquished only by the record title holder, and a partial relinquishment is not effective if it is filed by an applicant for an assignment which has not been approved.

Even if it were true that termination of an oil and gas lease was in part the result of Bureau of Land Management's failure to act timely on an assignment application, there is no authority either to withhold the effect of termination under 30 U.S.C. § 188(b) (1976) or to reinstate the lease under sec. 188(c), where there has been no payment of the full rental within 20 days after termination.

Reichhold Energy Corp., 40 IBLA 134 (Mar. 29, 1979)

Where the purchaser of an oil and gas lease asserts that he purchased the lease from the offeror whose drawing entry card was drawn with first priority, for cash consideration without knowledge of any irregularities or violation of the regulations, he is considered to be a bona fide purchaser, and his lease is not subject to cancellation unless prima facie evidence is presented to the contrary.

J. Theodore Ellis, D. E. Pack, 41 IBLA 231 (June 27, 1979)

BONA FIDE PURCHASER

Under 43 CFR 3102.1-2(a), BLM properly dismisses a protest and refuses to cancel an oil and gas lease which has been assigned to a bona fide purchaser prior to the initiation of the protest, regardless of the truth of allegations that the lease was subject to cancellation because the offeror/assignor's original offer was defective under 43 CFR 3102.7 and 3112.5-2.

Geosearch, Inc., 39 IBLA 49 (Jan. 16, 1979)

Where BLM does not reject simultaneous noncompetitive oil and gas lease offers drawn with second priority after the issuance of the leases to the first drawees, the second drawees retain an interest which must be considered if the leases are canceled because the first drawees' offers are defective, provided that the leases have not been assigned to bona fide purchasers. In

OIL AND GAS LEASES--Continued

BONA FIDE PURCHASER--Continued

those circumstances, BLM's decision dismissing the second drawees' protests against the continued validity of these leases for lack of interest must be vacated.

A decision by BLM dismissing protests against the continued validity of the leases because the assignees are bona fide purchasers will be vacated where the record contains no statement by the assignees of oil and gas leases that they are bona fide purchasers, and the matter will be remanded so that BLM may join the assignees to the protest proceedings in order to give them the opportunity to show that they hold and acquired the interest as bona fide purchasers, and to give the protestants the opportunity to present prima facie evidence to the contrary, per 43 CFR 3102.1-2(c).

Geosearch, Inc., 40 IBLA 397 (May 14, 1979)

Where BLM does not reject simultaneous noncompetitive oil and gas lease offers drawn with second priority after the issuance of the leases to the first drawees, the second drawees retain an interest which must be considered if the leases are canceled because the first drawees' offers are defective, provided that the leases have not been assigned to bona fide purchasers. In those circumstances, BLM's decision dismissing the second drawees' protests against the continued validity of these leases for lack of interest must be vacated.

A decision by BLM dismissing protests against the continued validity of the leases because the assignees are bona fide purchasers will be vacated where the record contains no statement by the assignees of oil and gas leases that they are bona fide purchasers, and the matter will be remanded so that BLM may join the assignees to the protest proceedings in order to give them the opportunity to show that they acquired the interest as bona fide purchasers, and to give the protestant the opportunity to present prima facie evidence to the contrary, per 43 CFR 3102.1-2(c). Where the assignees have alleged that they are bona fide purchasers, it is up to the protestant to show prima facie to the contrary.

Geosearch, Inc., 41 IBLA 291 (June 28, 1979)

BONDS

An oil and gas lessee is required to post bond before he may initiate drilling operations on his lease. Where it is noted in a decision appealed from that neither the lessee nor his operator have posted bond, and the lessee does not controvert this fact on appeal, it is properly found that there was no bond coverage.

Where a lessee is required by law to post bond before commencing drilling and fails to do so, any drilling operations actually undertaken by him do not constitute "diligent prosecution" of "actual drilling operations" in good faith under 43 CFR 3107.2-3, and he is therefore not entitled to an extension of his lease.

Richard P. Smoot, 39 IBLA 1 (Jan. 8, 1979)

A bond filed by an oil and gas lessee pursuant to 43 CFR 3814.1 may extend only to lands in which such lessee has record lease title interest and which lands were patented under the Stock-Raising Homestead Act, 43 U.S.C. §§ 291-301 (1970). Where a lessee has on file with a Bureau of Land Management State Office an approved Nationwide bond, a separate bond for the protection of surface owners is no longer required. 43 CFR 3104.2 and 3104.3.

Coquina Oil Corp., 41 IBLA 248 (June 27, 1979)

OIL AND GAS LEASES--Continued

CANCELLATION

Under 43 CFR 3102.1-2(a), BLM properly dismisses a protest and refuses to cancel an oil and gas lease which has been assigned to a bona fide purchaser prior to the initiation of the protest, regardless of the truth of allegations that the lease was subject to cancellation because the offeror/assignor's original offer was defective under 43 CFR 3102.7 and 3112.5-2.

Geosearch, Inc., 39 IBLA 49 (Jan. 16, 1979)

An oil and gas lease issued for land available for leasing, but in violation of an administrative regulatory requirement, need not be canceled in the absence of an intervening qualified applicant or some overriding policy consideration.

Merle C. Chambers, 40 IBLA 144 (Mar. 29, 1979)

An oil and gas lease issued on July 1, 1951, is not controlled by P.L. 83-555, effective July 29, 1954, and the lease therefore does not terminate automatically by operation of law if annual rental is not paid timely, as this law does not apply retroactively to the lease in the absence of written notice from the lessees that they have elected to subject their lease to this law. Rather, the mineral leasing law in effect prior to July 29, 1954, controls, under which the lessees' failure to pay annual rental subjects the lease to cancellation only after BLM gives them 30 days' notice of their failure to pay the rental timely. BLM's decision canceling such lease will be vacated where it did not give the lessees the required notice.

Allied Chemical Corp. et al., 40 IBLA 272 (Apr. 18, 1979)

COMPETITIVE LEASES

Where the high bid tendered at a competitive upland oil and gas lease sale, which is not clearly spurious or irresponsible, is rejected, and on appeal the offeror makes assertions which, if true, would undermine the factual basis for the rejection of the offer, the decision rejecting the offer will be set aside and the case remanded for the compilation of a more complete record and readjudication of the acceptability of the bid.

Ojai Oil Co., 39 IBLA 173 (Jan. 30, 1979)

The Secretary of the Interior has the authority to reject a high bid in a competitive oil and gas lease sale on the basis of an inadequate bonus where the rejection has a reasonable basis in fact.

Where high bids tendered at a competitive oil and gas lease sale, which are not clearly spurious or irresponsible, are rejected solely on the basis of a conclusory statement by an official of the Geological Survey that the bids are inadequate, and no factual basis for that conclusion appears in the case record, and a request for supporting documentation has been refused, the decision will be reversed as arbitrary and capricious.

Steven and Mary Lutz, 39 IBLA 386 (Feb. 28, 1979)

Under 43 CFR 3120.3-1, rejection of the high bid tendered for a parcel of land offered at a sale of competitive oil and gas leases will be affirmed where there is a rational basis for the conclusion that the highest bid was too low.

B. D. Price, 40 IBLA 85 (Mar. 22, 1979)

OIL AND GAS LEASES--Continued

COMPETITIVE LEASES--Continued

The Secretary of the Interior has the authority to reject a high bid in a competitive oil and gas lease sale on the basis of an inadequate bonus where the rejection has a reasonable basis in fact.

Where a high bid tendered at an uplands competitive oil and gas lease sale, which is not clearly spurious or irresponsible, is rejected solely on the basis of statements by an official of the Geological Survey that the bid is inadequate, and no substantial factual basis for that conclusion appears in the case record, and a request for supporting documentation has been refused by the Geological Survey, the decision will be reversed and the case remanded to the Bureau of Land Management for its evaluation of the acceptability of the bids.

Charles E. Hinkle, Chevron, U.S.A., Inc., 40 IBLA 250 (Apr. 16, 1979)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate.

The U.S. Geological Survey is the Secretary's technical expert in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases and the Secretary is entitled to rely on its reasoned analysis.

Where an uplands competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to disclose the factual basis for the conclusion that the bid is inadequate, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid.

Southern Union Exploration Co., 41 IBLA 81 (May 31, 1979)

The requirement of forfeiture of the bid deposit if the qualified high bidder fails to enter a lease must be enforced to prevent those bidders with greater capital resources from gaining an unfair advantage.

Fred S. Ghelarducci, 41 IBLA 277 (June 28, 1979)

Failure to execute a lease results in forfeiture of the bid deposit by the high bidder in a competitive oil and gas lease sale.

Bernard P. Gencorelli, 43 IBLA 7 (Sept. 11, 1979)

Where the notice of a competitive oil and gas lease sale clearly provided that the lease would be subject to stipulations, by making a bid, the offeror was bound to accept the stipulations.

Palmer Oil and Gas Co., 43 IBLA 115 (Sept. 24, 1979)

DISCRETION TO LEASE

The Secretary of the Interior has the authority to reject a high bid in a competitive oil and gas lease sale on the basis of an inadequate bonus where the rejection has a reasonable basis in fact.

Steven and Mary Lutz, 39 IBLA 386 (Feb. 28, 1979)

Charles E. Hinkle, Chevron, U.S.A., Inc., 40 IBLA 250 (Apr. 16, 1979)

OIL AND GAS LEASES--Continued

DISCRETION TO LEASE--Continued

The Secretary of the Interior may, in his discretion, reject an offer to lease public lands for oil and gas deposits upon a proper determination that the leasing would not be in the public interest, even though the land applied for is not withdrawn under the Mineral Leasing Act.

Robert P. Kunkel, 41 IBLA 77 (May 31, 1979)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate.

Southern Union Exploration Co., 41 IBLA 81 (May 31, 1979)

Under sec. 17 of the Mineral Leasing Act of 1920, as amended, and the regulations issued pursuant to that Act, the Secretary of the Interior has discretion to refuse to issue an oil and gas lease. The Secretary, through BLM, his duly authorized representative, may reject any offer to lease public lands for oil and gas upon a determination supported by facts of record that the leasing would not be in the public interest because it is incompatible with uses of the lands which are worthy of preservation. When the land, situated in Hell's Half Acre, has geological, ecological, scenic, and recreational values and is under study for its wilderness potential, and where BLM recommends that the lands not be leased pending further studies of the area, rejection of the lease offer will be affirmed, in the absence of compelling countervailing reasons.

R. C. Hoefle, 41 IBLA 174 (June 22, 1979)

A decision rejecting an oil and gas lease offer because it would result in undue degradation of the environment will be set aside where the record does not clearly support the conclusion reached by BLM.

John M. Lebfrom, 43 IBLA 67 (Sept. 19, 1979)

DRILLING

Nothing in the regulations requires an oil and gas lessee to request approval of a drilling plan from the Geological Survey more than 30 days in advance of the expiration of his lease. The regulations contemplate both a lessee's giving notice of intention to begin work and the district engineer's giving permission to proceed orally in cases of emergency.

An oil and gas lessee is required to post bond before he may initiate drilling operations on his lease. Where it is noted in a decision appealed from that neither the lessee nor his operator have posted bond, and the lessee does not controvert this fact on appeal, it is properly found that there was no bond coverage.

Where a lessee is required by law to post bond before commencing drilling and fails to do so, any drilling operations actually undertaken by him do not constitute "diligent prosecution" of "actual drilling operations" in good faith under 43 CFR 3107.2-3, and he is therefore not entitled to an extension of his lease.

Richard P. Smoot, 39 IBLA 1 (Jan. 8, 1979)

OIL AND GAS LEASES--Continued

DRILLING--Continued

The actions of a lessee in reentering a well to a depth of 11,640 feet where said well has been previously drilled to a depth of 12,895 feet do not constitute actual drilling operations within the terms of 30 U.S.C. § 226(e) (1976) so as to entitle the lessee to a 2-year extension of an oil and gas lease by drilling over the terminal date of the lease.

To obtain an extension to an oil and gas lease by drilling over the terminal date, actual drilling operations must be conducted in such a way as to be an effort which one seriously looking for oil and gas could be expected to make in that particular area, given existing knowledge of geological and other pertinent facts.

To qualify for an extension of a lease under 30 U.S.C. § 226(e) (1976), the evidence must show that actual drilling operations were diligently pursued on the leasehold on the last day of the lease, with bona fide intent to complete a producing well, as demonstrated by by circumstances, e.g., by a showing that the operation was thereafter expeditiously carried forward to such an extent that the effort constituted an acceptable test of a geologic stratum where it could reasonably be anticipated that commercial quantities of oil and/or gas might be discovered.

The bona fide intent of the lessee and the diligence with which he carries out that intent must be tested in accordance with the regulations, 43 CFR 3107.2-1 et seq., not only by the activity in progress at midnight of the last day, but by what transpires subseguently.

Phoenix Resources Co., 39 IBLA 153 (Jan. 29, 1979)

An application for permit to drill for oil and gas in a designated Potash Area is properly denied where the applicant fails to show that his application comes within either of the two exceptions to the policy in favor of potash development enunciated in an Order of the Secretary, dated Oct. 7, 1975, 40 FR 51486.

Belco Petroleum Corp., 42 IBLA 150 (Aug. 16, 1979)

EXTENSIONS

Nothing in the regulations requires an oil and gas lessee to request approval of a drilling plan from the Geological Survey more than 30 days in advance of the expiration of his lease. The regulations contemplate both a lessee's giving notice of intention to begin work and the district engineer's giving permission to proceed orally in cases of emergency.

An oil and gas lessee is required to post bond before he may initiate drilling operations on his lease. Where it is noted in a decision appealed from that neither the lessee nor his operator have posted bond, and the lessee does not controvert this fact on appeal, it is properly found that there was no bond coverage.

Where a lessee is required by law to post bond before commencing drilling and fails to do so, any drilling operations actually undertaken by him do not constitute "diligent prosecution" of "actual drilling operations" in good faith under 43 CFR 3107.2-3, and he is therefore not entitled to an extension of his lease.

Richard P. Smoot, 39 IBLA 1 (Jan. 8, 1979)

OIL AND GAS LEASES--Continued

EXTENSIONS--Continued

The actions of a lessee in reentering a well to a depth of 11,640 feet where said well has been previously drilled to a depth of 12,895 feet do not constitute actual drilling operations within the terms of 30 U.S.C. § 226(e) (1976) so as to entitle the lessee to a 2-year extension of an oil and gas lease by drilling over the terminal date of the lease.

To obtain an extension to an oil and gas lease by drilling over the terminal date, actual drilling operations must be conducted in such a way as to be an effort which one seriously looking for oil and gas could be expected to make in that particular area, given existing knowledge of geological and other pertinent facts.

To qualify for an extension of a lease under 30 U.S.C. § 226(e) (1976), the evidence must show that actual drilling operations were diligently pursued on the leasehold on the last day of the lease, with bona fide intent to complete a producing well, as demonstrated by circumstances, e.g., by a showing that the operation was thereafter expeditiously carried forward to such an extent that the effort constituted an acceptable test of a geologic stratum where it could reasonably be anticipated that commercial quantities of oil and/or gas might be discovered.

The bona fide intent of the lessee and the diligence with which he carries out that intent must be tested in accordance with the regulations, 43 CFR 3107.2-1 et seq., not only by the activity in progress at midnight of the last day, but by what transpires subsequently.

Phoenix Resources Co., 39 IBLA 153 (Jan. 29, 1979)

Where production has ceased on an oil and gas lease extended by production, and the record is unclear whether the conditions prescribed by 30 U.S.C. § 226(f) (1976) precluding termination of the lease have occurred, the case will be remanded to the Bureau of Land Management to reconsider with the Geological Survey if the lease has terminated, including a determination whether the lessee began reworking or drilling operations within 60 days after cessation of production and diligently prosecuted such operations before attaining production as asserted by him on appeal. A hearing should be held, if necessary, to resolve disputed facts.

Vern H. Bolinder and Julienne J. Bolinder, 40 IBLA 164 (Apr. 3, 1979)

The provision in a unit agreement allowing suspension of production requirements for unavoidable delays does not supplant the lessee's responsibility to comply with the procedure set out in the regulation for obtaining a suspension. A written application for suspension must be filed in triplicate with the area oil and gas supervisor prior to the expiration of the leases.

Suspension of production requirements for leases on which there are no wells capable of producing in paying quantities must be approved by the Secretary; this authority is not delegated to other officers below the Secretarial level.

"A well capable of producing oil or gas in paying quantities." The provision in 30 U.S.C. § 226(f) (1976) referring to a well capable of producing oil or gas in paying quantities refers to a well which is actually in physical condition to produce a sufficient quantity of oil or gas to yield a reasonable profit over and above the costs of operating the well and marketing the product. A satisfactory test of a well to establish its capability as of the termination date is necessary.

OIL AND GAS LEASES--Continued

EXTENSIONS--Continued

Evidence which only supports inferences is not sufficient, nor is a showing only of a potential prospect for profitable operation at some future time.

American Resources Management Corp., 40 IBLA 195 (Apr. 5, 1979)

A 20-year oil and gas lease which has been renewed for successive 10-year periods, and which at the time of expiration of a 10-year period is committed to an approved unit plan of development, is not entitled to another 10-year renewal, but can be extended only pursuant to 30 U.S.C. § 226(j) (1976).

Texaco, Inc., 40 IBLA 294 (Apr. 27, 1979)

An oil and gas lease is properly extended for 2 years pursuant to 30 U.S.C. § 226(e) (1976) and 43 CFR 3107.2-3 where prior to the expiration of the primary term of the lease, the lease is committed to an approved cooperative unit or plan and actual drilling operations are being conducted on behalf of the lease within the unit plan. For the purpose of qualifying for the extension, the determinative date of approval of the unit agreement is the effective date of the approved agreement rather than the actual date it is signed by U.S. Geological Survey.

Integrity Oil and Gas Co., 42 IBLA 222 (Aug. 22, 1979)

A hearing is properly ordered where there exist issues of fact the resolution of which will determine whether an oil and gas lease concluding its primary term was converted from rental status to royalty status. Appellant shall have the burden of proof to establish by a preponderance of the evidence (a) that the Dolezal-Government #1 well was capable of producing oil and gas in paying quantities on Oct. 31, 1978, or (b) that there was a discovery of oil or gas in paying quantities on lease W 15891 on Oct. 31, 1978. If either (or both) of these propositions is established, the subject lease was not subject to automatic termination by law for failure to make timely rental payment.

Coronado Oil Co., 42 IBLA 235 (Aug. 22, 1979)

Noncompetitive oil and gas leases are issued for a primary term of 10 years. Unless one of the statutory grounds for extension is established, such leases expire by operation of law at the end of their primary term.

James E. and Mary E. Grohoski, 43 IBLA 94 (Sept. 19, 1979)

FIRST-QUALIFIED APPLICANT

The first-drawn entry card of a corporation which has failed to comply with the regulations governing qualifications must be rejected.

Appellant's request that it be permitted to furnish the evidence of qualifications on appeal is denied. In simultaneous oil and gas leasing, the only difference between the drawing entry cards is the order in which they are drawn. The applications are considered to have been simultaneously made. Giving an unqualified first-drawn entrant additional time to file infringes on the rights of the second-drawn qualified offeror.

University of the Trees, 40 IBLA 74 (Mar. 16, 1979)

OIL AND GAS LEASES--Continued

FIRST-QUALIFIED APPLICANT--Continued

A first-drawn simultaneous drawing entry card which is defective because of noncompliance with a mandatory regulation must be rejected and may not be "cured" by submission of further information.

Charles J. King, 40 IBLA 276 (Apr. 18, 1979)

When, in a drawing of simultaneously filed oil and gas lease offers, the first-drawn offeror is notified to submit the first year's advance rental, that rental must be received by the proper office within the prescribed 15 days. Automatic disqualification, stemming from failure to pay timely, will not be avoided by allegations that payment was mailed far enough in advance to arrive at BLM timely.

American Petrofina Co. of Texas, 41 IBLA 126 (June 13, 1979)

A first-drawn entry card creates no vested right therein; the offeror gains merely a right of priority in consideration. The Department is authorized to accept only the offer of the first-qualified applicant, one who has fully complied with all mandatory regulations.

Harry A. Zuckerman et al., 41 IBLA 372 (July 23, 1979)

An oil and gas lease may be awarded to the first-qualified applicant only. The regulations governing qualifications are mandatory, and strict compliance therewith is required.

A defective drawing card offer for an oil and gas lease is not curable by submission of required evidence of qualifications after the drawing, for the reason that the rights of the second- and third-drawn qualified offerors have intervened. Where appellant's offer was third drawn and eventually accorded priority and then ultimately disqualified, the parcel described therein must be included in a subsequent list of lands available for simultaneous filing.

Don C. Bell II (Trustee), 42 IBLA 21 (July 25, 1979)

Where an applicant with first priority dies after filing an oil and gas lease application but prior to issuance of the lease, his personal representative, heirs, or devisees are entitled to the lease provided there is filed in all cases an offer to lease in compliance with 43 CFR 3102.8. Such offer will be effective as of the date of the original lease offer filed by the deceased.

Lamar M. Richardson, Jr., 42 IBLA 333 (Aug. 30, 1979)

KNOWN GEOLOGIC STRUCTURE

Under 30 U.S.C. § 226(b) (1976) land within the known geologic structure of a producing oil or gas field may only be leased by competitive bidding, and where land is determined to be within such a structure while a noncompetitive lease offer is pending, the offer must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination by the Geological Survey that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

"Known geologic structure." A known geologic structure is technically the trap in which an accumulation of oil or gas has been discovered by drilling and determined

OIL AND GAS LEASES--Continued

KNOWN GEOLOGIC STRUCTURE--Continued

to be productive, the limits of which include all acreage that is presumptively productive.

When on appeal a sufficient showing is made to call into question a determination that land lies within a known geologic structure of a producing oil or gas field, and a hearing is requested, the decision may be set aside and remanded for hearing.

Jack J. Bender, 40 IBLA 26 (Mar. 9, 1979)

The failure of the BLM officer to follow the procedure set out in a Secretarial Order requiring all offers, prior to issuance of a lease, to be sent to Geological Survey for a determination of whether the lands are within a known geologic structure, renders the signing of the lease unauthorized, and thus not binding on the Secretary.

Generally, the signing of an oil and gas lease by the authorized officer of the Bureau of Land Management is the act that constitutes issuance of the lease. When land is determined to be within a known geologic structure prior to authorized issuance of a lease, noncompetitive lease offers must be rejected and the land may be leased only by competitive bidding.

One who challenges the classification of lands as within a known geologic structure has the burden of showing that the determination is in error, and the classification will not be disturbed in the absence of a clear and definite showing of error.

United States v. William T. Alexander (On Court Remand), 41 IBLA 1 (May 21, 1979)

LANDS SUBJECT TO

Erroneous issuance by BLM of oil and gas lease on other withdrawn land in area of tract for which appellant submitted lease offer does not effect restoration to leasing of latter withdrawn tract.

F. M. Tully, 39 IBLA 137 (Jan. 29, 1979)

Land included within an outstanding oil and gas lease is not available to leasing and an oil and gas lease offer filed for such land must be rejected.

Alver C. Duncan, 39 IBLA 144 (Jan. 29, 1979)

"Lands not available for leasing." Under 43 CFR 3110.1-3(a), lands are deemed to be not available for leasing when they are surrounded by lands contained within patents with no oil and gas rights reserved to the United States, when they are segregated from oil and gas leasing by withdrawal, or are embraced within an outstanding lease with an effective issuance date prior to the filing date of the subject offer.

Helen E. Reid, 39 IBLA 378 (Feb. 28, 1979)

A noncompetitive oil and gas lease issued for lands which, at the time of the lease application, had been posted erroneously as available for leasing but were then included in a prior lease, will be allowed to continue in effect where the first lease expired before the second lease issued and no questions of public policy or third party rights are contravened by the lease issuance.

Reed Gilmore, 40 IBLA 139 (Mar. 29, 1979)

OIL AND GAS LEASES--Continued

LANDS SUBJECT TO--Continued

Oil and gas offers, filed for lands withdrawn by PLO No. 5418, must be rejected. The order was issued under the authority of the Pickett Act, 43 U.S.C. §§ 141-142 (1970), repealed by FLPMA, and the order was not arbitrary, capricious, or an abuse of discretion.

Bristol Bay Native Corp., 41 IBLA 85 (June 4, 1979)

Under sec. 17 of the Mineral Leasing Act of 1920, as amended, and the regulations issued pursuant to that Act, the Secretary of the Interior has discretion to refuse to issue an oil and gas lease. The Secretary, through BLM, his duly authorized representative, may reject any offer to lease public lands for oil and gas upon a determination supported by facts of record that the leasing would not be in the public interest because it is incompatible with uses of the lands which are worthy of preservation. When the land, situated in Hell's Half Acre, has geological, ecological, scenic, and recreational values and is under study for its wilderness potential, and where BLM recommends that the lands not be leased pending further studies of the area, rejection of the lease offer will be affirmed, in the absence of compelling countervailing reasons.

R. C. Hoefle, 41 IBLA 174 (June 22, 1979)

The Mineral Leasing Act for Acquired Lands does not exclude from oil and gas leasing those lands underlying the Missouri River within the boundaries of the Fort Berthold Indian Reservation as established by the Treaty of Fort Laramie (1851) and the Executive Order of Apr. 12, 1870, which were reacquired by the United States from the Indian tribes. The exclusion in the Act for submerged lands refers to submerged coastal lands, as set forth in 43 CFR 3101.2-1(g).

Impel Energy Corp., 42 IBLA 105 (Aug. 16, 1979)

Land within the National Desert Wildlife Range is not subject to noncompetitive oil and gas leasing.

Kenneth F. Cummings, 43 IBLA 110 (Sept. 24, 1979)

NONCOMPETITIVE LEASES

Where an offeror for a noncompetitive, over-the-counter oil and gas lease certifies that he is a United States citizen, his failure to disclose whether he is a native-born or naturalized citizen will not support rejection of his offer where an offeror for a noncompetitive, simultaneous oil and gas lease is not required to disclose similar information.

Jas. O. Breene, Jr., 39 IBLA 43 (Jan. 16, 1979)

Under 30 U.S.C. § 226(b) (1976) land within the known geologic structure of a producing oil or gas field may only be leased by competitive bidding, and where land is determined to be within such a structure while a noncompetitive lease offer is pending, the offer must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination by the Geological Survey that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

Jack J. Bender, 40 IBLA 26 (Mar. 9, 1979)

OIL AND GAS LEASES--Continued

NONCOMPETITIVE LEASES--Continued

When a State Office rejects the offer of a first-drawn applicant in a drawing under the simultaneous oil and gas leasing program, an appeal by the applicant raises the issue of his qualifications to hold the lease. The qualifications of the second-drawn applicant are irrelevant until such time as the offer of the first-drawn applicant is rejected and all his avenues of appeal are exhausted. However, it is not improper for BIM to name the second-drawn applicant as an adverse party in a decision rejecting the first-drawn applicant.

Thomas R. Flickinger, William S. Flickinger, et al., 40 IBLA 53 (Mar. 16, 1979)

Noncompetitive oil and gas leases are issued for a primary term of 10 years. Unless one of the statutory grounds for extension is established, such leases expire by operation of law at the end of their primary term.

James E. and Mary E. Grohoski, 43 IBLA 94 (Sept. 19, 1979)

PRODUCTION

An oil and gas lease issued for a primary term of 10 years and extended for 2 years by drilling cannot be extended further by payment of compensatory royalty where there is no showing that the leasehold is suffering drainage from an adjoining tract, and no compensatory royalty has been assessed by the district supervisor under 30 CFR 221.21(c).

Chaparral Resources, Inc., 39 IBLA 269 (Feb. 15, 1979)

"A well capable of producing oil or gas in paying quantities." The provision in 30 U.S.C. § 226(f) (1976) referring to a well capable of producing oil or gas in paying quantities refers to a well which is actually in physical condition to produce a sufficient quantity of oil or gas to yield a reasonable profit over and above the costs of operating the well and marketing the product. A satisfactory test of a well to establish its capability as of the termination date is necessary. Evidence which only supports inferences is not sufficient, nor is a showing only of a potential prospect for profitable operation at some future time.

American Resources Management Corp., 40 IBLA 195 (Apr. 5, 1979)

"Paying Quantities." The term "paying quantities," used in the Brady (Deep) Unit Agreement to determine whether or not a participating area of a unit should include additional tracts where the existence of hydrocarbons in paying quantities is disputed, refers to cost of drilling and production plus a reasonable profit.

The U.S. Geological Survey is the technical expert of the Department in matters concerning geologic evaluation of oil and gas lease production, and the Secretary is entitled to rely on the Survey's determinations, as to the extent of the participating area of a unit, absent a clear showing of error.

Amoco Production Co., 41 IBLA 348 (July 11, 1979)

OIL AND GAS LEASES--Continued

REINSTATEMENT

A petition for reinstatement of an oil and gas lease terminated for lack of timely rental payment is properly denied where the appellant does not show reasonable diligence in mailing the payment or a justifiable excuse for the delay in payment.

Helen Bacha, 39 IBLA 146 (Jan. 29, 1979)

An oil and gas lease which has terminated by operation of law due to late payment of annual rental will not be reinstated where it appears that the rental payment was not mailed early enough to account for the normal delays in the transmission of the mail.

Reynolds Mining Corp., 39 IBLA 405 (Mar. 2, 1979)

The burden of showing that the failure to pay annual rent for an oil and gas lease on or before the anniversary date of the lease was justifiable or not due to a lack of reasonable diligence is on the lessee. The fact that the lessee retained a leasing service which misrepresented that it would file appropriate assignment documents prior to the anniversary date does not justify late payment. Mailing of the annual rental payment on a date after it is due does not constitute reasonable diligence.

Saxe, Bacon and Bolan, P.C., 40 IBLA 5 (Mar. 6, 1979)

A lessee may be entitled to reinstatement of the lease if it is shown, among other things, that reasonable diligence was exercised in mailing the payment, or that the delay in remitting the rental is justifiable. Where a lessee is unable to make the requisite showing, a petition for reinstatement is properly denied.

Reasonable diligence generally requires mailing the rental payment sufficiently in advance of the anniversary or due date to account for normal delays in collection, transmittal, and delivery of the mail. This board has repeatedly held that reasonable diligence has not been exercised where a rental payment is posted at a time that one could not assume delivery before the statutory terminal date of the lease.

Lack of diligence may be justifiable if it is demonstrated that at or near the anniversary date there existed sufficiently extenuating circumstances outside the lessee's control which affected his or her actions in paying the rental fee.

Bernard W. Crowe, 40 IBLA 114 (Mar. 27, 1979)

Even if it were true that termination of an oil and gas lease was in part the result of Bureau of Land Management's failure to act timely on an assignment application, there is no authority either to withhold the effect of termination under 30 U.S.C. § 188(b) (1976) or to reinstate the lease under sec. 188(c), where there has been no payment of the full rental within 20 days after termination.

Reichhold Energy Corp., 40 IBLA 134 (Mar. 29, 1979)

A lease terminated automatically for untimely payment of annual rental may be reinstated only upon proof that reasonable diligence was exercised, or that the lack of diligence was justified. In the absence of such proof, a petition for reinstatement is properly denied.

Reasonable diligence ordinarily requires mailing the payment sufficiently in advance of the anniversary date

OIL AND GAS LEASES--Continued

REINSTATEMENT--Continued

to account for normal delays in the collection, transmittal, and delivery of the mail.

Untimely payment of the annual rental may be justified if proximately caused by extenuating circumstances outside the lessee's control which occurred at or near the anniversary date of the lease.

Estate of Kenneth F. Krammes, 40 IBLA 147 (Mar. 29, 1979)

A lessee generally has not demonstrated reasonable diligence where the rental payment was postmarked in Austin, Tex., the day before it was due in Santa Fe, N.M. An allegation that the payment was mailed prior to the postmark date must be corroborated by sufficient evidence. An assertion that the rental check was mailed 2 days before the due date and an allegation that mail service between Texas and New Mexico "is overnight" is not sufficient alone to overcome the postmark date.

Manuel F. Cueto, Jr., 40 IBLA 265 (Apr. 16, 1979)

An oil and gas lessee may be entitled to reinstatement of the lease if it is shown, among other things, that reasonable diligence was exercised in mailing the payment, or that the delay in remitting the rental is justifiable. Where a lessee is unable to make the requisite showing, a petition for reinstatement is properly denied.

Under 30 U.S.C. § 188(c) (1976), the Secretary of the Interior has no authority to reinstate an oil and gas lease terminated by operation of law for failure to make timely payment of rental, unless rental payment is tendered at the proper office within 20 days after the due date.

John A. Steele, Jr., 41 IBLA 49 (May 29, 1979)

The postmark date on an envelope bearing payment of annual rental on oil and gas lease will be deemed to be the date of mailing in the absence of evidence to the contrary.

An oil and gas lease which has terminated for failure to pay rental timely may be reinstated under 30 U.S.C. § 188(c) (1976) if the failure was either justifiable or not due to a lack of reasonable diligence, and where neither has been shown the application must be rejected.

Joseph M. Semien, 41 IBLA 185 (June 22, 1979)

Reinstatement of an oil and gas lease is properly denied where the lease holder of record delegated responsibility for payment to a purported assignee who failed to make timely payment of the advance rental to the proper BLM office.

Bryan Wagner and Sidney Lazard, 41 IBLA 188 (June 22, 1979)

The postmark date on a letter bearing payments of annual rental for an oil and gas lease will be deemed to be the date of mailing, in the absence of satisfactory evidence corroborating the lessee's assertion that the payments were mailed before the postmark date.

Where appellant alleges he mailed payment from York, Pennsylvania, to Salt Lake City, Utah, on Nov. 28, 1978, a Wednesday, and payment was due there on Dec. 1, 1978, a Friday, but was not received until Dec. 4, 1978, the

OIL AND GAS LEASES--Continued

REINSTATEMENT--Continued

following Monday, and envelope was postmarked Nov. 30, 1978, these facts ordinarily do not constitute a reasonably diligent attempt to pay the rental in a timely manner.

Glen C. Chronister, 41 IBLA 346 (July 11, 1979)

An oil and gas lease which has terminated by operation of law for failure to pay the annual rental on or before the due date may not be reinstated unless, among other conditions, payment has been tendered within 20 days of the anniversary date.

Beatrice G. Wood, 42 IBLA 148 (Aug. 16, 1979)

An oil and gas lease on which there is no well capable of producing oil and gas in paying quantities automatically terminates if the lessee fails to pay the annual rental on or before the anniversary date of the lease. A terminated lease can be reinstated only if, among other requirements, the lessee shows his failure to pay on time was either justifiable or not due to a lack of reasonable diligence.

Reasonable diligence requires mailing the rental payment sufficiently in advance of the anniversary date to account for normal delays in collection, transmittal, and delivery of the mail. Mailing the rental the day it is due does not constitute reasonable diligence.

Where a lessee presents no evidence that illness of a family member or a heavy work load were so disruptive as to prevent him from carrying on his other routine activities as usual, the late payment of rental on an oil and gas lease is not justified by the illness or the work.

Victor Holz, 42 IBLA 284 (Aug. 27, 1979)

An oil and gas lease, terminated for failure to pay annual rental on or before the anniversary date of the lease, can be reinstated only if the petitioner shows that the failure was either justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after it is due does not meet the reasonable diligence requirement.

Reliance on receipt of a courtesy billing notice from BLM is not a justifiable excuse upon which to predicate reinstatement of an oil and gas lease terminated for failure to pay rental timely. The fact that the courtesy rental notice was delayed in reaching appellant because it was sent to appellant's former address is not a justifiable excuse for late payment.

William M. Steiskal, 42 IBLA 304 (Aug. 27, 1979)

Where the failnre to pay rental on or before the anniversary date of a lease is attributable to a breakdown in mailing procedures within the parent company of the lessee, neither reasonable diligence nor justification is shown to support a petition for reinstatement.

The Secretary may reinstate a lease terminated by operation of law for failure to pay on or before the anniversary date the full amount of rental due where it is shown to the satisfaction of the Secretary that such failure was either justifiable or not due to a lack of reasonable diligence on the part of the lessee. 30 U.S.C. § 188(c) (1976). Reasonable diligence normally requires sending or delivering payments sufficiently in advance of the anniversary date to account

OIL AND GAS LEASES--Continued

REINSTATEMENT--Continued

for normal delays in the collection, transmittal, and delivery of the payment. 43 CFR 3108.2-1(c)(2) (1977).

Fuel Resources Development Co., 43 IBLA 19 (Sept. 11, 1979)

Failure to pay the annual rental for an oil and gas lease on or before the anniversary date results in the automatic termination of the lease by operation of law. A lease may be reinstated if the failure to pay the rental timely was either justifiable or not due to a lack of reasonable diligence on the part of the lessee.

In order for the failure to pay oil and gas lease rental timely to be considered justifiable, it must be caused by factors outside the lessee's control, which were the proximate cause of the failure.

Reasonable diligence normally requires sending the payment sufficiently in advance of the due date to account for normal delays in the collection, transmittal, and delivery of the payment.

When rental payment for an oil and gas lease is mailed after the date it is due, there can be no basis for reinstating the lease because of reasonable diligence.

When appellant's failure to mail his rental payment timely is caused by carelessness or inadvertance, his petition for reinstatement of an oil and gas lease is properly denied.

James E. Kordosky and Robert A. Weiss, 43 IBLA 63 (Sept. 18, 1979)

Under 30 U.S.C. § 188(c) (1976), the Secretary of the Interior has no authority to reinstate an oil and gas lease terminated by operation of law for failure to make timely payment of rental, unless rental payment is tendered at the proper office within 20 days after the due date.

Sigmund Mateiko, 43 IBLA 96 (Sept. 20, 1979)

RELINQUISHMENTS

Upon failure of a lessee to pay full rental on or before the anniversary date of a lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease automatically terminates by operation of law, despite a partial payment submitted on the basis of a partial relinquishment which is not yet effective.

An oil and gas lease may be relinquished only by the record title holder, and a partial relinquishment is not effective if it is filed by an applicant for an assignment which has not been approved.

Reichhold Energy Corp., 40 IBLA 134 (Mar. 29, 1979)

RENEWALS

To obtain a renewal of a 20-year oil and gas lease the lessee should file an application for renewal at least 90 days prior to the expiration of the lease term. However, this requirement is permissive and a delay in filing the application may be excused in the presence of special circumstances.

Homestake Oil and Gas Co., 40 IBLA 262 (Apr. 16, 1979)

OIL AND GAS LEASES--Continued

RENEWALS--Continued

A 20-year oil and gas lease which has been renewed for successive 10-year periods, and which at the time of expiration of a 10-year period is committed to an approved unit plan of development, is not entitled to another 10-year renewal, but can be extended only pursuant to 30 U.S.C. § 226(j) (1976).

Texaco, Inc., 40 IBLA 294 (Apr. 27, 1979)

RENTALS

BLM does not waive its right to declare a lease expired by cashing an advance annual rental check and placing funds in an unearned account.

Richard P. Smoot, 39 IBLA 1 (Jan. 8, 1979)

A noncompetitive oil and gas lease offer for acquired lands, filed "over-the-counter," is properly rejected when the accompanying rental payment is deficient by more than 10 percent. However, where the balance of the rental is tendered with the notice of appeal, the offer may be reinstated with priority from the date the deficiency was corrected.

George S. Swan, 39 IBLA 47 (Jan. 16, 1979)

An oil and gas lease which has terminated by operation of law due to late payment of annual rental will not be reinstated where it appears that the rental payment was not mailed early enough to account for the normal delays in the transmission of the mail.

Reynolds Mining Corp., 39 IBLA 405 (Mar. 2, 1979)

An oil and gas lease issued on July 1, 1951, is not controlled by P.L. 83-555, effective July 29, 1954, and the lease therefore does not terminate automatically by operation of law if annual rental is not paid timely, as this law does not apply retroactively to the lease in the absence of written notice from the lessees that they have elected to subject their lease to this law. Rather, the mineral leasing law in effect prior to July 29, 1954, controls, under which the lessees' failure to pay annual rental subjects the lease to cancellation only after BLM gives them 30 days' notice of their failure to pay the rental timely. BLM's decision canceling such lease will be vacated where it did not give the lessees the required notice.

Allied Chemical Corp. et al., 40 IBLA 272 (Apr. 18, 1979)

Under 43 CFR 3312.4-1, a successful drawee who fails to submit the first year's advance rental within 15 days of his receipt of notice that it is due is automatically disqualified to receive the lease.

Donald E. Jordan (Supp.), 41 IBLA 60 (May 31, 1979)

When, in a drawing of simultaneously filed oil and gas lease offers, the first-drawn offeror is notified to submit the first year's advance rental, that rental must be received by the proper office within the prescribed 15 days. Automatic disqualification, stemming

OIL AND GAS LEASES--Continued

RENTALS--Continued

from failure to pay timely, will not be avoided by allegations that payment was mailed far enough in advance to arrive at BLM timely.

American Petrofina Co. of Texas, 41 IBLA 126 (June 13, 1979)

Where the rental payment accompanying a noncompetitive oil and gas lease offer for acquired lands, filed over-the-counter, is deficient by more than 10 percent due to an increase in the rental rate subsequent to the filing of the offer, and Bureau of Land Management requests submission of the deficient rental within 30 days, BLM may properly reject the lease offer when the additional rental is not submitted within the 30 days.

Hansen Brothers, 42 IBLA 40 (July 31, 1979)

An oil and gas lease on which there is no well capable of producing oil and gas in paying quantities automatically terminates if the lessee fails to pay the annual rental on or before the anniversary date of the lease. A terminated lease can be reinstated only if, among other requirements, the lessee shows his failure to pay on time was either justifiable or not due to a lack of reasonable diligence.

Reasonable diligence requires mailing the rental payment sufficiently in advance of the anniversary date to account for normal delays in collection, transmittal, and delivery of the mail. Mailing the rental the day it is due does not constitute reasonable diligence.

Where a lessee presents no evidence that illness of a family member or a heavy work load were so disruptive as to prevent him from carrying on his other routine activities as usual, the late payment of rental on an oil and gas lease is not justified by the illness or the work.

Victor Holz, 42 IBLA 284 (Aug. 27, 1979)

Reliance on receipt of a courtesy billing notice from BLM is not a justifiable excuse upon which to predicate reinstatement of an oil and gas lease terminated for failure to pay rental timely. The fact that the courtesy rental notice was delayed in reaching appellant because it was sent to appellant's former address is not a justifiable excuse for late payment.

William M. Steiskal, 42 IBLA 304 (Aug. 27, 1979)

Where an offer is drawn No. 1 in a simultaneous oil and gas lease drawing and the offeror is notified by BLM that the rental due is $1,955, the offer will be disqualified under 43 CFR 3112.4-1 when the offeror submits a check for $1,954 within the time required, but fails to submit the $1 deficiency within the allowed time.

C. Panos, 42 IBLA 326 (Aug. 30, 1979)

Where the failure to pay rental on or before the anniversary date of a lease is attributable to a breakdown in mailing procedures within the parent company of the lessee, neither reasonable diligence nor justification is shown to support a petition for reinstatement.

The Secretary may reinstate a lease terminated by operation of law for failure to pay on or before the anniversary date the full amount of rental due where it is shown to the satisfaction of the Secretary that such failure was either justifiable or not due to a

OIL AND GAS LEASES--Continued

RENTALS--Continued

lack of reasonable diligence on the part of the lessee. 30 U.S.C. § 188(c) (1976). Reasonable diligence normally requires sending or delivering payments sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal, and delivery of the payment. 43 CFR 3108.2-1(c)(2) (1977).

Fuel Resources Development Co., 43 IBLA 19 (Sept. 11, 1979)

Failure to pay the annual rental for an oil and gas lease on or before the anniversary date results in the automatic termination of the lease by operation of law. A lease may be reinstated if the failure to pay the rental timely was either justifiable or not due to a lack of reasonable diligence on the part of the lessee.

In order for the failure to pay oil and gas lease rental timely to be considered justifiable, it must be caused by factors outside the lessee's control, which were the proximate cause of the failure.

Reasonable diligence normally requires sending the payment sufficiently in advance of the due date to account for normal delays in the collection, transmittal, and delivery of the payment.

When rental payment for an oil and gas lease is mailed after the date it is due, there can be no basis for reinstating the lease because of reasonable diligence.

When appellant's failure to mail his rental payment timely is caused by carelessness or inadvertance, his petition for reinstatement of an oil and gas lease is properly denied.

James E. Kordosky and Robert A. Weiss, 43 IBLA 63 (Sept. 18, 1979)

Where BLM sends by certified mail a request for payment of advance rental to the address of record of a successful offeror in a simultaneously filed oil and gas lease drawing and such request is returned by the Post Office, marked "Moved, left no address," the offeror is properly deemed to have "receipt of notice" under 43 CFR 1810.2. Where the address of record of the offeror is that of a leasing service and the leasing service moves, filing a change of address form with the Post Office in the name of the leasing service, but not in the name of appellant, the Post Office properly returned the notice addressed to the offeror to BLM.

A successful offeror in a BLM simultaneous filing procedure who fails to pay the first year's advance rental within 15 days from the receipt of notice that such payment is due will be disqualified as an offeror.

Roy Lindgren, 43 IBLA 139 (Sept. 28, 1979)

ROYALTIES

An oil and gas lease issued for a primary term of 10 years and extended for 2 years by drilling cannot be extended further by payment of compensatory royalty where there is no showing that the leasehold is suffering drainage from an adjoining tract, and no compensatory royalty has been assessed by the district supervisor under 30 CFR 221.21(c).

Chaparral Resources, Inc., 39 IBLA 269 (Feb. 15, 1979)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

A request for refund of excess payments under 43 U.S.C. § 1339 (1970) must be made as the limitation in the statute provides, within 2 years from the date such payments are actually made.

Phillips Petroleum Co., 39 IBLA 393 (Mar. 2, 1979)

Where the holder of an oil and gas lease on the Outer Continental Shelf has filed a suit in a Federal district court to recover certain royalties paid under his lease, the Board of Land Appeals will affirm a decision of the Director, Geological Survey, holding in abeyance the lessee's request for a refund while the suit is pending.

Tenneco Oil Co., 41 IBLA 195 (June 22, 1979)

STIPULATIONS

Upon a determination that a stipulation, which was not expressly made applicable to a parcel of land in the Notice of Availability, should be applied to an oil and gas lease, the State Office should inform the offeror of its intent to apply the stipulation. The application of such a stipulation is reviewable under 43 CFR 4.410.

Duncan Miller (On Reconsideration), 39 IBLA 312 (Feb. 23, 1979)

The Bureau of Land Management may require the execution of special stipulations to protect environmental and other land use values when deciding to issue a lease.

Robert P. Kunkel, 41 IBLA 77 (May 31, 1979)

Where the surface administering agency proposes stipulations to protect the wilderness potential of National Forest lands from oil and gas operations, additional stipulations to that end are not to be imposed by the Bureau of Land Management, absent a compelling showing of need therefor.

Robert Schulein, 41 IBLA 253 (June 28, 1979)

Robert Schulein, 42 IBLA 54 (July 31, 1979)

Where Bureau of Land Management requests within 30 days the execution of special stipulations prepared by the Forest Service for acquired lands embraced in a noncompetitive oil and gas lease offer, filed over-the-counter, it may properly reject the lease offer when the special stipulations are not executed and submitted within the 30 days.

Hansen Brothers, 42 IBLA 40 (July 31, 1979)

Where the land embraced in a proposed oil and gas lease, to be issued subsequent to the enactment of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (1976), has been identified as having wilderness characteristics and is being reviewed for possible preservation as wilderness pursuant to sec. 603 of that Act, it is proper for the Bureau of Land Management to require the execution of a special stipulation providing that consent to oil and gas operations will not be given if it is determined that such operations will impair the land's wilderness characteristics.

Where the land embraced in a proposed oil and gas lease has been identified as having wilderness characteristics

OIL AND GAS LEASES--Continued

STIPULATIONS--Continued

and is being reviewed for possible preservation as wilderness pursuant to sec. 603 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782 (1976), it is proper for the Bureau of Land Management to require the execution of a special stipulation providing that oil and gas operations are subject to regulation where the obvious aim is protecting the wilderness values inherent in the land.

Reserve Oil, Inc., et al., 42 IBLA 190 (Aug. 22, 1979)

It is not improper for BLM to require an oil and gas lease offeror to sign a stipulation which provides that the lease will be subject to regulations promulgated by the Department of Energy relating to those areas specified in sec. 302 of the Department of Energy Organization Act of 1977, even though the offeror as lessee would be bound to follow the law and regulations if he did not sign the stipulation, as the stipulation merely serves the purpose of informing him that the statute and regulations will apply.

James M. Chudnow, 42 IBLA 307 (Aug. 29, 1979)

Where BLM's decision to reject a noncompetitive lease offer is based upon a report that the findings and conclusions contained in the Management Framework Plan (MFP) for the area show that acceptance of the offer would not be in the public interest because the lease would threaten valuable wildlife, archaeological, paleontological, scenic, and recreation values, and it is subsequently revealed that the report relied upon misstated the contents of the MFP, which actually made provision for mineral leasing subject to certain protective stipulations, the decision will be reversed and remanded with instructions to issue the lease with appropriate and reasonable stipulations.

James O. Breene, Jr. (On Reconsideration), 42 IBLA 395 (Sept. 11, 1979)

A decision rejecting an oil and gas lease offer because it would result in undue degradation of the environment will be set aside where the record does not clearly support the conclusion reached by BLM.

John M. Lebfrom, 43 IBLA 67 (Sept. 19, 1979)

Departmental regulations 43 CFR Subpart 3109 and 43 CFR 3120.2-3, and sec. 603 of the Federal Land Policy and Management Act of 1976 provide ample authority for the Bureau of Land Management to require oil and gas lessees to agree to wilderness protection stipulations.

Where the notice of a competitive oil and gas lease sale clearly provided that the lease would be subject to stipulations, by making a bid, the offeror was bound to accept the stipulations.

Palmer Oil and Gas Co., 43 IBLA 115 (Sept. 24, 1979)

SUSPENSIONS

The Department of the Interior is not authorized to suspend an expired noncompetitive oil and gas lease so as to revive and extend the lease term unless an application therefor was filed before the expiration of the lease.

Burton Hancock, 40 IBLA 1 (Mar. 6, 1979)

OIL AND GAS LEASES--Continued

SUSPENSIONS--Continued

The provision in a unit agreement allowing suspension of production requirements for unavoidable delays does not supplant the lessee's responsibility to comply with the procedure set out in the regulation for obtaining a suspension. A written application for suspension must be filed in triplicate with the area oil and gas supervisor prior to the expiration of the leases.

Suspension of production requirements for leases on which there are no wells capable of producing in paying quantities must be approved by the Secretary; this authority is not delegated to other officers below the Secretarial level.

American Resources Management Corp., 40 IBLA 195 (Apr. 5, 1979)

TERMINATION

An oil and gas lease issued for a primary term of 10 years and extended for 2 years by drilling cannot be extended further by payment of compensatory royalty where there is no showing that the leasehold is suffering drainage from an adjoining tract, and no compensatory royalty has been assessed by the district supervisor under 30 CFR 221.21(c).

Chaparral Resources, Inc., 39 IBLA 269 (Feb. 15, 1979)

A noncompetitive oil and gas lease cannot be extended beyond the end of its primary term by commitment to an approved unit agreement where no actual drilling has been commenced anywhere within the unit on the date the lease is due to expire.

Burton Hancock, 40 IBLA 1 (Mar. 6, 1979)

Upon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease automatically terminates by operation of law.

A lessee may be entitled to reinstatement of the lease if it is shown, among other things, that reasonable diligence was exercised in mailing the payment, or that the delay in remitting the rental is justifiable. Where a lessee is unable to make the requisite showing, a petition for reinstatement is properly denied.

Reasonable diligence generally requires mailing the rental payment sufficiently in advance of the anniversary or due date to account for normal delays in collection, transmittal, and delivery of the mail. This board has repeatedly held that reasonable diligence has not been exercised where a rental payment is posted at a time that one could not assume delivery before the statutory terminal date of the lease.

Lack of diligence may be justifiable if it is demonstrated that at or near the anniversary date there existed sufficiently extenuating circumstances outside the lessee's control which affected his or her actions in paying the rental fee.

Bernard W. Crowe, 40 IBLA 114 (Mar. 27, 1979)

Although deficiencies in an application for assignment of an oil and gas lease may be timely cured, 30 U.S.C. § 187a (1976) specifies the time when an assignment is effective, and no assignment can be approved for a terminated oil and gas lease.

Upon failure of a lessee to pay full rental on or before the anniversary date of a lease, for any lease on

OIL AND GAS LEASES--Continued

TERMINATION--Continued

which there is no well capable of producing oil or gas in paying quantities, the lease automatically terminates by operation of law, despite a partial payment submitted on the basis of a partial relinquishment which is not yet effective.

Even if it were true that termination of an oil and gas lease was in part the result of Bureau of Land Management's failure to act timely on an assignment application, there is no authority either to withhold the effect of termination under 30 U.S.C. § 188(b) (1976) or to reinstate the lease under sec. 188(c), where there has been no payment of the full rental within 20 days after termination.

Reichhold Energy Corp., 40 IBLA 134 (Mar. 29, 1979)

A lease terminated automatically for untimely payment of annual rental may be reinstated only upon proof that reasonable diligence was exercised, or that the lack of diligence was justified. In the absence of such proof, a petition for reinstatement is properly denied.

Reasonable diligence ordinarily requires mailing the payment sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal, and delivery of the mail.

Untimely payment of the annual rental may be justified if proximately caused by extenuating circumstances outside the lessee's control which occurred at or near the anniversary date of the lease.

Estate of Kenneth F. Krammes, 40 IBLA 147 (Mar. 29, 1979)

An oil and gas lease which is in its extended term because of production terminates when production ceases unless pursuant to 30 U.S.C. § 226(f) (1976): (1) reworking or drilling operations are begun within 60 days after cessation and are continued with reasonable diligence until production resumes; (2) the Secretary has ordered or consented to suspension of operations or production; or (3) for lands on which there is a well capable of production, the lessee places the well in producing status at least within 60 days of receipt of notice to do so.

Where production has ceased on an oil and gas lease extended by production, and the record is unclear whether the conditions prescribed by 30 U.S.C. § 226(f) (1976) precluding termination of the lease have occurred, the case will be remanded to the Bureau of Land Management to reconsider with the Geological Survey if the lease has terminated, including a determination whether the lessee began reworking or drilling operations within 60 days after cessation of production and diligently prosecuted such operations before attaining production as asserted by him on appeal. A hearing should be held, if necessary, to resolve disputed facts.

Vern H. Bolinder and Julienne J. Bolinder, 40 IBLA 164 (Apr. 3, 1979)

The provision in a unit agreement allowing suspension of production requirements for unavoidable delays does not supplant the lessee's responsibility to comply with the procedure set out in the regulation for obtaining a suspension. A written application for suspension must be filed in triplicate with the area oil and gas supervisor prior to the expiration of the leases.

OIL AND GAS LEASES--Continued

TERMINATION--Continued

Suspension of production requirements for leases on which there are no wells capable of producing in paying quantities must be approved by the Secretary; this authority is not delegated to other officers below the Secretarial level.

Where the Geological Survey, in making its decision, has reviewed the same information submitted on appeal to the Board of Land Appeals to show that there was a well capable of producing oil or gas in paying quantities on the date the lease expired, and there are no disputed facts, but only a dispute on the proper application of the law to those facts and legal interpretations, a hearing is not warranted in the case.

"A well capable of producing oil or gas in paying quantities." The provision in 30 U.S.C. § 226(f) (1976) referring to a well capable of producing oil or gas in paying quantities refers to a well which is actually in physical condition to produce a sufficient quantity of oil or gas to yield a reasonable profit over and above the costs of operating the well and marketing the product. A satisfactory test of a well to establish its capability as of the termination date is necessary. Evidence which only supports inferences is not sufficient, nor is a showing only of a potential prospect for profitable operation at some future time.

American Resources Management Corp., 40 IBLA 195 (Apr. 5, 1979)

An oil and gas lease issued on July 1, 1951, is not controlled by P.L. 83-555, effective July 29, 1954, and the lease therefore does not terminate automatically by operation of law if annual rental is not paid timely, as this law does not apply retroactively to the lease in the absence of written notice from the lessees that they have elected to subject their lease to this law. Rather, the mineral leasing law in effect prior to July 29, 1954, controls, under which the lessees' failure to pay annual rental subjects the lease to cancellation only after BLM gives them 30 days' notice of their failure to pay the rental timely. BLM's decision canceling such lease will be vacated where it did not give the lessees the required notice.

Allied Chemical Corp. et al., 40 IBLA 272 (Apr. 18, 1979)

An oil and gas lessee may be entitled to reinstatement of the lease if it is shown, among other things, that reasonable diligence was exercised in mailing the payment, or that the delay in remitting the rental is justifiable. Where a lessee is unable to make the requisite showing, a petition for reinstatement is properly denied.

John A. Steele, Jr., 41 IBLA 49 (May 29, 1979)

An oil and gas lease which is in its extended term because of production terminates when production ceases unless pursuant to 30 U.S.C. § 226(f) (1976): (1) reworking or drilling operations are begun within 60 days after cessation and are continued with reasonable diligence until production resumes; (2) the Secretary has ordered or consented to suspension of operations or production; or (3) for lands on which there is a well capable of production, the lessee places the well in producing status at least within 60 days of receipt of notice to do so.

John S. Pehar, 41 IBLA 191 (June 22, 1979)

OIL AND GAS LEASES--Continued

TERMINATION--Continued

An oil and gas lease which has terminated by operation of law for failure to pay the annual rental on or before the due date may not be reinstated unless, among other conditions, payment has been tendered within 20 days of the anniversary date.

Beatrice G. Wood, 42 IBLA 148 (Aug. 16, 1979)

A hearing is properly ordered where there exist issues of fact the resolution of which will determine whether an oil and gas lease concluding its primary term was converted from rental status to royalty status. Appellant shall have the burden of proof to establish by a preponderance of the evidence (a) that the Dolezal-Government #1 well was capable of producing oil and gas in paying quantities on Oct. 31, 1978, or (b) that there was a discovery of oil or gas in paying quantities on lease W 15891 on Oct. 31, 1978. If either (or both) of these propositions is established, the subject lease was not subject to automatic termination by law for failure to make timely rental payment.

Coronado Oil Co., 42 IBLA 235 (Aug. 22, 1979)

An oil and gas lease on which there is no well capable of producing oil and gas in paying quantities automatically terminates if the lessee fails to pay the annual rental on or before the anniversary date of the lease. A terminated lease can be reinstated only if, among other requirements, the lessee shows his failure to pay on time was either justifiable or not due to a lack of reasonable diligence.

Victor Holz, 42 IBLA 284 (Aug. 27, 1979)

Where the failure to pay rental on or before the anniversary date of a lease is attributable to a breakdown in mailing procedures within the parent company of the lessee, neither reasonable diligence nor justification is shown to support a petition for reinstatement.

The Secretary may reinstate a lease terminated by operation of law for failure to pay on or before the anniversary date the full amount of rental due where it is shown to the satisfaction of the Secretary that such failure was either justifiable or not due to a lack of reasonable diligence on the part of the lessee. 30 U.S.C. § 188(c) (1976). Reasonable diligence normally requires sending or delivering payments sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal, and delivery of the payment. 43 CFR 3108.2-1(c)(2) (1977).

Fuel Resources Development Co., 43 IBLA 19 (Sept. 11, 1979)

TWENTY-YEAR LEASES

To obtain a renewal of a 20-year oil and gas lease the lessee should file an application for renewal at least 90 days prior to the expiration of the lease term. However, this requirement is permissive and a delay in filing the application may be excused in the presence of special circumstances.

Homestake Oil and Gas Co., 40 IBLA 262 (Apr. 16, 1979)

OIL AND GAS LEASES--Continued

TWENTY-YEAR LEASES--Continued

A 20-year oil and gas lease which has been renewed for successive 10-year periods, and which at the time of expiration of a 10-year period is committed to an approved unit plan of development, is not entitled to another 10-year renewal, but can be extended only pursuant to 30 U.S.C. § 226(j) (1976).

Texaco, Inc., 40 IBLA 294 (Apr. 27, 1979)

UNIT AND COOPERATIVE AGREEMENTS

A noncompetitive oil and gas lease cannot be extended beyond the end of its primary term by commitment to an approved unit agreement where no actual drilling has been commenced anywhere within the unit on the date the lease is due to expire.

Burton Hancock, 40 IBLA 1 (Mar. 6, 1979)

A 20-year oil and gas lease which has been renewed for successive 10-year periods, and which at the time of expiration of a 10-year period is committed to an approved unit plan of development, is not entitled to another 10-year renewal, but can be extended only pursuant to 30 U.S.C. § 226(j) (1976).

Texaco, Inc., 40 IBLA 294 (Apr. 27, 1979)

It is not proper to deny a creditable request for approval of unavoidable delay time under sec. 16 of the Santa Ynez Unit Agreement, even though the Geological Survey considers the unit agreement extended by diligent drilling operations.

Exxon Co., U.S.A., 41 IBLA 118 (June 13, 1979)

"Paying Quantities." The term "paying quantities," used in the Brady (Deep) Unit Agreement to determine whether or not a participating area of a unit should include additional tracts where the existence of hydrocarbons in paying quantities is disputed, refers to cost of drilling and production plus a reasonable profit.

The U.S. Geological Survey is the technical expert of the Department in matters concerning geologic evaluation of oil and gas lease production, and the Secretary is entitled to rely on the Survey's determinations, as to the extent of the participating area of a unit, absent a clear showing of error.

Amoco Production Co., 41 IBLA 348 (July 11, 1979)

An oil and gas lease is properly extended for 2 years pursuant to 30 U.S.C. § 226(e) (1976) and 43 CFR 3107.2-3 where prior to the expiration of the primary term of the lease, the lease is committed to an approved cooperative unit or plan and actual drilling operations are being conducted on behalf of the lease within the unit plan. For the purpose of qualifying for the extension, the determinative date of approval of the unit agreement is the effective date of the approved agreement rather than the actual date it is signed by U.S. Geological Survey.

Integrity Oil and Gas Co., 42 IBLA 222 (Aug. 22, 1979)

OIL AND GAS LEASES--Continued

UNIT AND COOPERATIVE AGREEMENTS--Continued

Where Geological Survey and one of two parties to a compulsory unitization of two outer continental shelf oil and gas leases request a remand of a Survey decision for further consideration, and certain issues raised on appeal would appropriately be better first considered by Survey, the case will be remanded to Survey. In the circumstances, a request to stay implementation of Survey's prior decision may be granted by the Board unless and until Survey acts upon the request when it reconsiders the case.

Sun Oil Co., 42 IBLA 254 (Aug. 23, 1979)

WELL CAPABLE OF PRODUCTION

An oil and gas lease which is in its extended term because of production terminates when production ceases unless pursuant to 30 U.S.C. § 226(f) (1976): (1) reworking or drilling operations are begun within 60 days after cessation and are continued with reasonable diligence until production resumes; (2) the Secretary has ordered or consented to suspension of operations or production; or (3) for lands on which there is a well capable of production, the lessee places the well in producing status at least within 60 days of receipt of notice to do so.

Vern H. Bolinder and Julienne J. Bolinder, 40 IBLA 164 (Apr. 3, 1979)

John S. Pehar, 41 IBLA 191 (June 22, 1979)

Suspension of production requirements for leases on which there are no wells capable of producing in paying quantities must be approved by the Secretary; this authority is not delegated to other officers below the Secretarial level.

Where the Geological Survey, in making its decision, has reviewed the same information submitted on appeal to the Board of Land Appeals to show that there was a well capable of producing oil or gas in paying quantities on the date the lease expired, and there are no disputed facts, but only a dispute on the proper application of the law to those facts and legal interpretations, a hearing is not warranted in the case.

"A well capable of producing oil or gas in paying quantities." The provision in 30 U.S.C. § 226(f) (1976) referring to a well capable of producing oil or gas in paying quantities refers to a well which is actually in physical condition to produce a sufficient quantity of oil or gas to yield a reasonable profit over and above the costs of operating the well and marketing the product. A satisfactory test of a well to establish its capability as of the termination date is necessary. Evidence which only supports inferences is not sufficient, nor is a showing only of a potential prospect for profitable operation at some future time.

American Resources Management Corp., 40 IBLA 195 (Apr. 5, 1979)

A hearing is properly ordered where there exist issues of fact the resolution of which will determine whether an oil and gas lease concluding its primary term was converted from rental status to royalty status. Appellant shall have the burden of proof to establish by a preponderance of the evidence (a) that the Dolezal-Government #1 well was capable of producing oil and gas in paying quantities on Oct. 31, 1978, or (b) that there was a discovery of oil or gas in paying quantities on lease W 15891 on Oct. 31, 1978. If either (or both) of these propositions is established, the subject

OIL AND GAS LEASES--Continued

WELL CAPABLE OF PRODUCTION--Continued

lease was not subject to automatic termination by law for failure to make timely rental payment.

Coronado Oil Co., 42 IBLA 235 (Aug. 22, 1979)

OIL SHALE

WITHDRAWALS

Oil shale withdrawals administered by the Department of the Interior have reserved water rights for the purposes of investigation, examination and classification of those lands. Water is not reserved for actual oil shale development.

Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914 (June 25, 1979)
86 I.D. 553

OREGON AND CALIFORNIA RAILROAD AND RECONVEYED COOS BAY GRANT LANDS

GENERALLY

There are no reserved water rights on the revested Oregon and California Railroad lands and the Coos Bay Wagon Road lands, the "O&C" lands.

FLPMA, the Taylor Grazing Act, the O&C Act, and other statutes permit the United States to appropriate water for the diverse purposes found in the various statutes.

Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914 (June 25, 1979)
86 I.D. 553

OUTER CONTINENTAL SHELF LANDS ACT

OIL AND GAS LEASES

A request for refund of excess payments under 43 U.S.C. § 1339 (1970) must be made as the limitation in the statute provides, within 2 years from the date such payments are actually made.

Phillips Petroleum Co., 39 IBLA 393 (Mar. 2, 1979)

It is not proper to deny a creditable request for approval of unavoidable delay time under sec. 16 of the Santa Ynez Unit Agreement, even though the Geological Survey considers the unit agreement extended by diligent drilling operations.

Exxon Co., U.S.A., 41 IBLA 118 (June 13, 1979)

Where the holder of an oil and gas lease on the Outer Continental Shelf has filed a suit in a Federal district court to recover certain royalties paid under his lease, the Board of Land Appeals will affirm a decision of the Director, Geological Survey, holding in abeyance the lessee's request for a refund while the suit is pending.

Tenneco Oil Co., 41 IBLA 195 (June 22, 1979)

OUTER CONTINENTAL SHELF LANDS ACT--Continued

REFUNDS

A request for refund of excess payments under 43 U.S.C. § 1339 (1970) must be made as the limitation in the statute provides, within 2 years from the date such payments are actually made.

Phillips Petroleum Co., 39 IBLA 393 (Mar. 2, 1979)

UNIT PLANS

Where Geological Survey and one of two parties to a compulsory unitization of two outer continental shelf oil and gas leases request a remand of a Survey decision for further consideration, and certain issues raised on appeal would appropriately be better first considered by Survey, the case will be remanded to Survey. In the circumstances, a request to stay implementation of Survey's prior decision may be granted by the Board unless and until Survey acts upon the request when it reconsiders the case.

Sun Oil Co., 42 IBLA 254 (Aug. 23, 1979)

PATENTS OF PUBLIC LANDS

GENERALLY

An entryman may not take advantage of sec. 7 of the Act of Mar. 3, 1891, entitling an entryman to a patent after 2 years from date of issuance of a receiver's receipt when there is no pending contest or protest against the validity of the entry, where he has not shown that preconditions of the Act have been met, i.e., making the final payments required.

United States v. Jack Zemmy Boyd, Jr., 39 IBLA 321 (Feb. 27, 1979)

Mere nonuse of land patented under the Recreation and Public Purposes Act is not equivalent to a devotion of the land to an unauthorized use and, of itself, will not cause the title to revert to the United States.

A patent which names as the grantee a fictional, nonexistent person or corporation is a nullity and ineffective for all purposes, and where the invalidity appears by reference to any matter of which judicial notice may be taken, the patent is null and void on its face, and no recourse to a court is necessary to procure its cancellation.

Where the grantee of land under the Recreation and Public Purposes Act enters into an executory contract to convey an interest in a portion of the land to another, who then undertakes to perform his obligation to enter the land and improve it without prior Departmental approval, this constitutes an attempt on the part of the patentee to make an unauthorized transfer of title or control, and title to the entire tract reverts to the United States.

Sky Pilots of Alaska, Inc., 40 IBLA 355 (May 14, 1979)

A decision holding that a tract of land has reverted to the United States must be affirmed where the land was patented to a municipality under authority of a special statute which expressly provided that the town shall not have the right to sell or convey any part thereof and that if the land shall not be used as public park it shall revert to the United States, and where the record shows that the municipality conveyed two small parcels to the State and has never used the remainder

PATENTS OF PUBLIC LANDS--Continued

GENERALLY--Continued

for park purposes in the intervening 60 years since the patent issued.

City of Okanogan, Washington, State of Washington, 41 IBLA 98 (June 4, 1979)

A decision by the Bureau of Land Management canceling fee simple patents issued to Indians and simultaneously issuing new Indian trust patents is not subject to review by the Board of Land Appeals, which has no jurisdiction in the matter, where the decision was made at the direction of the Assistant Secretary for Indian Affairs.

Blue Star, Inc., Atomic Western, Inc., Fremont Energy Corp., Ivor Adair, 41 IBLA 333 (July 11, 1979)

EFFECT

A patent which names as the grantee a fictional, nonexistent person or corporation is a nullity and ineffective for all purposes, and where the invalidity appears by reference to any matter of which judicial notice may be taken, the patent is null and void on its face, and no recourse to a court is necessary to procure its cancellation.

Sky Pilots of Alaska, Inc., 40 IBLA 355 (May 14, 1979)

The effect of the issuance of a patent, even if issued by mistake or inadvertence, is to transfer the legal title from the United States and to remove from the jurisdiction of the Department consideration of all disputed questions concerning rights to the land.

Albert A. Cushing, Jr., 41 IBLA 41 (May 29, 1979)

Berthlyn Jane Baker, 41 IBLA 239 (June 27, 1979)

SUITS TO CANCEL

A patent which names as the grantee a fictional, nonexistent person or corporation is a nullity and ineffective for all purposes, and where the invalidity appears by reference to any matter of which judicial notice may be taken, the patent is null and void on its face, and no recourse to a court is necessary to procure its cancellation.

Sky Pilots of Alaska, Inc., 40 IBLA 355 (May 14, 1979)

PAYMENTS

GENERALLY

BLM does not waive its right to declare a lease expired by cashing an advance annual rental check and placing funds in an unearned account.

Richard P. Smoot, 39 IBLA 1 (Jan. 8, 1979)

Where an offer is drawn No. 1 in a simultaneous oil and gas lease drawing and the offeror is notified by BLM that the rental due is $1,955, the offer will be disqualified under 43 CFR 3112.4-1 when the offeror submits a check for $1,954 within the time required,

PAYMENTS--Continued

GENERALLY--Continued

but fails to submit the $1 deficiency within the allowed time.

C. Panos, 42 IBLA 326 (Aug. 30, 1979)

PRACTICE BEFORE THE DEPARTMENT

PERSONS QUALIFIED TO PRACTICE

Where contestees in a mining claim contest file a timely answer to the contest complaint, this answer is efficacious as to any other contestees who are members of his family if it appears on the face of the answer that they wish to retain their interests, if any, in the claims, as the contestees who answered may be regarded as having done so on their family members' behalf. In these circumstances, these other contestees are properly regarded as having answered the complaint, absent any manifestation of a contrary intent.

United States v. Jerry Prock et al., 39 IBLA 148 (Jan. 29, 1979)

The Department has determined that an official of the Bureau of Indian Affairs is not entitled to represent a Native allotment applicant in an appeal to the Board of Land Appeals. However, where the case involves the propriety of proofs submitted by the Bureau of Indian Affairs in behalf of a deceased Native allotment applicant, that issue may be resolved.

Ernest L. Olson, Jr. (Deceased), 41 IBLA 179 (June 22, 1979)

The Department has determined that an official of the Bureau of Indian Affairs is not entitled to represent a Native allotment applicant in an appeal to the Board of Land Appeals. However, where the partial rejection of an Alaska Native allotment application turns on the resolution of a factual issue, the case will be remanded to BLM so that heirs or claimants to the estate of the deceased applicant may be afforded notice and opportunity for hearing.

Unknown Heirs of Migley Kelly, 41 IBLA 387 (July 24, 1979)

PRIVATE EXCHANGES

GENERALLY

The Act of Mar. 20, 1922, authorized exchanges for the purpose of consolidating national forest lands, if two criteria were satisfied: (1) the public interest would be benefited thereby; and (2) the proffered lands were chiefly valuable for national forest purposes.

Petro Leasco, Inc., 42 IBLA 345 (Aug. 31, 1979)

PUBLIC INTEREST

The Act of Mar. 20, 1922, authorized exchanges for the purpose of consolidating national forest lands, if two criteria were satisfied: (1) the public interest would be benefited thereby; and (2) the proffered lands were chiefly valuable for national forest purposes.

Petro Leasco, Inc., 42 IBLA 345 (Aug. 31, 1979)

PUBLIC LANDS

GENERALLY

Under the Supremacy Clause, U.S. CONST., art. VI, cl. 2, Federal laws, including Federal grazing regulations, override conflicting State laws with respect to public lands.

Colvin Cattle Co., Inc., 39 IBLA 176 (Jan. 30, 1979)

Where the Secretary has declined to exercise his jurisdiction, a decision rendered by this Board is final for the Department. Hence, statements by BLM and arguments of the Solicitor, while valuable to the Board, are not binding upon the Board.

H. R. Delasco, Inc., et al., 39 IBLA 194 (Feb. 2, 1979)

Federal title to land may be lost by erosion, and land which has become submerged under water is no longer subject to disposition under the Alaska Native Allotment Act. The fact that an Alaska Native may have used, occupied, and filed an application for such land when it was dry does not prevent the loss of Federal title to that land by erosion. Neither the Alaska Statehood Act nor the Submerged Lands Act prevents the passage of title to such land to the State.

Frank Rulland, 41 IBLA 207 (June 27, 1979) 86 I.D. 342

CLASSIFICATION

Where the Secretary by appropriate notice in the Federal Register has classified certain lands for multiple use management and such lands are segregated from desert land entry, and the classification has not been terminated by either a reclassification or publication in Federal Register of termination of classification, BLM properly denied petition-application for desert land entry.

Paul M. Jenkins, 39 IBLA 141 (Jan. 29, 1979)

Melvin V. Frandsen, Mary C. Frandsen, 43 IBLA 130 (Sept. 26, 1979)

Lands segregated on the public records by a proposed withdrawal posted Apr. 6, 1973, or a Recreational and Public Purposes Classification filed Nov. 13, 1956, were not available for the location of mining claims, and claims thereafter located are null and void ab initio.

Neither a Recreation and Public Purposes Act classification nor a withdrawal is a rule or regulation within the ambit of the Secretarial policy of Apr. 27, 1971, which provides for utilization of the public participation procedures of 5 U.S.C. § 553 (1976).

Mining claims purportedly located on land not available for such location confer no property right upon the locator, and may be declared null and void ab initio without a hearing under 5 U.S.C. § 554 et seq. (1976).

Delmer McLean et al., 40 IBLA 34 (Mar. 15, 1979)

PUBLIC LANDS--Continued

DISPOSALS OF

Generally

An error in omitting to survey an island in a navigable stream does not divest the United States of title or interpose any obstacle to surveying it at a later time. An island within the public domain in a navigable stream and actually in existence both at the time of the survey of the banks of the stream and also upon the admission to the Union of the State within which it is situated remains the property of the United States. Even though omitted from survey, such land does not become part of the fractional subdivisions on the opposite banks of the stream.

Public lands owned by the United States cannot be subjected to taxation by the State in which they are located. When Congress has prescribed the conditions upon which portions of the public domain may be alienated and has provided that upon fulfillment of certain conditions the United States shall issue patent, the land becomes taxable only after the applicant has fulfilled all conditions precedent to such conveyance. Payment of taxes to a State for Federal land does not afford the taxpayer any rights against the United States, unless specifically provided by a Federal statute.

Joseph Tomalino, August Sobotka, 42 IBLA 117 (Aug. 16, 1979)

LEASES AND PERMITS

That part of a decision rejecting a headquarters site purchase application which requires the applicant to remove his improvements from the site within 90 days may be set aside and the case remanded to the Alaska State Office to determine whether a temporary use permit can be granted authorizing continued use of the improvements.

Rene P. Lamoureux d/b/a Frenchy Lamoureux, 39 IBLA 36 (Jan. 15, 1979)

Where the State Office, following recommendations of the National Park Service, rejects applications for oil and gas leases under the "excepted areas" provisions of 43 CFR 3111.1-3(e)(4), and where it appears that large portions of the applied-for lands do not fall within such areas, the case will be remanded to reconsider whether the leasing of lands not in excepted areas would be appropriate.

D. L. Percell, 40 IBLA 126 (Mar. 28, 1979)

SPECIAL USE PERMITS

That part of a decision rejecting a headquarters site purchase application which requires the applicant to remove his improvements from the site within 90 days may be set aside and the case remanded to the Alaska State Office to determine whether a temporary use permit can be granted authorizing continued use of the improvements.

Rene P. Lamoureux d/b/a Frenchy Lamoureux, 39 IBLA 36 (Jan. 15, 1979)

Where an application for a special use permit is not filed until more than 10 months after a deadline for doing so imposed by BLM, it is properly rejected.

Where a permittee is not familiar with an unpublished BLM policy to the effect that the tardy filing of an

PUBLIC LANDS--Continued

SPECIAL USE PERMITS--Continued

application for permit renewal in 1978 makes the permittee a "new" applicant in 1979 and, as such, ineligible to receive a permit, BLM's decision enforcing this policy and rejecting the permittee's 1979 application will be reversed.

Outdoor Adventure River Specialists, Inc., 41 IBLA 132 (June 14, 1979)

The issuance of special use permits is discretionary and BLM may properly reject a permit application if the use identified is inconsistent with BLM's objectives, responsibilities and programs for managing the public lands. BLM may propose alternatives or impose restrictions or stipulations in order to issue a permit consistent with its responsibilities.

Southern California Motorcycle Club, Inc., Sierra Club, 42 IBLA 164 (Aug. 17, 1979)

PUBLIC RECORDS

Public lands owned by the United States cannot be subjected to taxation by the State in which they are located. When Congress has prescribed the conditions upon which portions of the public domain may be alienated and has provided that upon fulfillment of certain conditions the United States shall issue patent, the land becomes taxable only after the applicant has fulfilled all conditions precedent to such conveyance. Payment of taxes to a State for Federal land does not afford the taxpayer any rights against the United States, unless specifically provided by a Federal statute.

Joseph Tomalino, August Sobotka, 42 IBLA 117 (Aug. 16, 1979)

RECLAMATION LANDS

GENERALLY

Sec. 8 of the 1902 Reclamation Act, 43 U.S.C. § 372 et seq. (1976), prohibits the Bureau of Reclamation from claiming any reserved water rights for any reclamation project unless the terms of any project authorization subsequent to 1902 can fairly be read to provide for a reservation of water.

Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914 (June 25, 1979)
86 I.D. 553

RECREATION AND PUBLIC PURPOSES ACT

Lands segregated on the public records by a proposed withdrawal posted Apr. 6, 1973, or a Recreational and Public Purposes Classification filed Nov. 13, 1956, were not available for the location of mining claims, and claims thereafter located are null and void ab initio.

Neither a Recreation and Public Purposes Act classification nor a withdrawal is a rule or regulation within the ambit of the Secretarial policy of Apr. 27, 1971, which provides for utilization of the public participation procedures of 5 U.S.C. § 553 (1976).

Delmer McLean et al., 40 IBLA 34 (Mar. 15, 1979)

RECREATION AND PUBLIC PURPOSES ACT--Continued

Where a lease under the Recreation and Public Purposes Act, as amended, 43 U.S.C. § 869 (1976), erroneously states the 1-year rental as being the rental for 5 years, and the lessee knew or had reason to know of the error, the error is a unilateral mistake, and the lease may be properly corrected to show the true rental, or the lease may be rescinded if appellant does not desire to be bound by the reformed agreement.

St. Scholastica Academy, 40 IBLA 175 (Apr. 3, 1979)

Mere nonuse of land patented under the Recreation and Public Purposes Act is not equivalent to a devotion of the land to an unanthorized use and, of itself, will not cause the title to revert to the United States.

Where the grantee of land under the Recreation and Public Purposes Act enters into an executory contract to convey an interest in a portion of the land to another, who then undertakes to perform his obligation to enter the land and improve it without prior Departmental approval, this constitutes an attempt on the part of the patentee to make an unauthorized transfer of title or control, and title to the entire tract reverts to the United States.

Sky Pilots of Alaska, Inc., 40 IBLA 355 (May 14, 1979)

A recreation and public purposes classification, issued pursuant to the Recreation Act of 1926, as amended, 43 U.S.C. § 869 (1976), segregates Alaskan lands from Native allotment applications until such time as the classification is revoked.

Under Secretarial Order No. 3040, it is sufficient if the 5 years' use and occupancy, required under the Native Allotment Act, is completed prior to the granting of the allotment, providing applicant either filed for his allotment or commenced use and occupancy prior to the withdrawal.

Betty J. Thompson, 43 IBLA 174 (Sept. 28, 1979)

REGULATIONS

GENERALLY

The Secretary could establish general policy in right-of-way regulations which would provide specific guidelines for determining how much uncertainty about use will prevent the processing of right-of-way applications.

Federal Land Policy and Management Act's Effect on the Right-of-Way Application for the Middle Fork Reservoir on the Powder River, Wyoming, M-36900 (Jan. 12, 1979)
86 I.D. 293

In view of 43 U.S.C.A. § 1752(c) (West Supp. 1978), which dictates that in certain circumstances the present grazing user shall have a right of first refusal for any new lease, 43 CFR 4110.5 (43 FR 29070), must be read in pari materia therewith and with 43 CFR 4130.2(e) (43 FR 29072) to be construed as a valid regulation and must be interpreted not to apply where the present grazing user desires a new lease and otherwise meets the statutory and regulatory criteria.

Harvey Sheehan and Hazel Holland Mudon, 39 IBLA 56 (Jan. 16, 1979)
86 I.D. 51

REGULATIONS--Continued

GENERALLY--Continued

Where a mining claim is located after the enactment of the Federal Land Policy and Management Act of 1976 (Oct. 21, 1976), but before the date of promulgation of regulations implementing the statutory requirements of the Act relative to the recordation of mining claims, a regulation having retroactive effects may nonetheless be sustained in spite of such retroactivity if it is reasonable.

Elbert O. Jensen, 39 IBLA 62 (Jan. 17, 1979)

All persons dealing with the Government are presumed to have knowledge of duly promulgated regulations.

Juan Munoz, 39 IBLA 72 (Jan. 24, 1979)

Charles and Pete Caress, 41 IBLA 302 (June 29, 1979)

Persons dealing with the Government are presumed to have knowledge of pertinent rules and regulations, regardless of their actual knowledge of what is contained in such regulations.

University of the Trees, 40 IBLA 74 (Mar. 16, 1979)

John A. Steele, Jr., 41 IBLA 49 (May 29, 1979)

All persons dealing with the Government are presumed to have knowledge of duly promulgated statutes and regulations.

Dale C. DeLor, 40 IBLA 88 (Mar. 22, 1979)

A noncompetitive oil and gas lease issued for lands which, at the time of the lease application, had been posted erroneously as available for leasing but were then included in a prior lease, will be allowed to continue in effect where the first lease expired before the second lease issued and no questions of public policy or third party rights are contravened by the lease issuance.

Reed Gilmore, 40 IBLA 139 (Mar. 29, 1979)

The regulations of this Department have the force and effect of law, and are binding upon the Secretary and those who exercise his delegated authority. Where a patent application regulation requires "full, true, and complete abstracts," and the surface of the mining claim has not been patented, the processing of patent applications accompanied only by limited abstracts is properly suspended, pending compliance with the regulation. Where, however, the surface of the mining claim has been patented, e.g., under the Stock-Raising Homestead Act, 43 U.S.C. §§ 291-300 (1970), the abstract generally need only reflect transactions affecting the mineral estate. A certificate of title is acceptable in lieu of an abstract in either situation.

Kerr-McGee Nuclear Corp. et al., 41 IBLA 197 (June 22, 1979)

All persons dealing with the Government are presumed to have knowledge of duly promulgated regulations. Such regulations have the force and effect of law and are binding on the Department.

Fred S. Ghelarducci, 41 IBLA 277 (June 28, 1979)

Bernard P. Gencorelli, 43 IBLA 7 (Sept. 11, 1979)

REGULATIONS--Continued

APPLICABILITY

A final Departmental appellate decision construing a regulation will be given immediate effect, and will not be applied with prospective effect only, unless the decision alters materially the interpretation given the regulation by earlier Departmental decisions or official published opinions, and unless the equitable benefit of the decision is not outweighed by ill effects of allowing a benefit in derogation of the regulation.

Gertrude H. D'Amico, 39 IBLA 68 (Jan. 17, 1979)

Applications for rights-of-way on public lands pending on Oct. 22, 1976, are to be considered as applications under Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), but existing regulations will govern the administration of public lands to the extent practical until new regulations are promulgated.

Donald R. Clark, C. Reinhart & Son, Inc., Hartwell Excavating Co., 39 IBLA 182 (Jan. 31, 1979)

The interpretation of an existing regulation by this Board to determine its applicability to the facts at hand does not constitute rulemaking by the Board.

H. R. Delasco, Inc., et al., 39 IBLA 194 (Feb. 2, 1979)

BINDING ON THE SECRETARY

The Secretary of the Interior is bound by his duly promulgated regulations, and such regulations have the force and effect of law.

Elizabeth Pagedas (On Reconsideration), 40 IBLA 21 (Mar. 9, 1979)

St. Scholastica Academy, 40 IBLA 175 (Apr. 3, 1979)

All persons dealing with the Government are presumed to have knowledge of duly promulgated regulations. Such regulations have the force and effect of law and are binding on the Department.

Fred S. Ghelarducci, 41 IBLA 277 (June 28, 1979)

Bernard P. Gencorelli, 43 IBLA 7 (Sept. 11, 1979)

FORCE AND EFFECT AS LAW

The Secretary of the Interior is bound by his duly promulgated regulations, and such regulations have the force and effect of law.

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All persons dealing with the Government are presumed to have knowledge of duly promulgated regulations. Such regulations have the force and effect of law and are binding on the Department.

Fred S. Ghelarducci, 41 IBLA 277 (June 28, 1979)

Bernard P. Gencorelli, 43 IBLA 7 (Sept. 11, 1979)

REGULATIONS--Continued

INTERPRETATION

In view of 43 U.S.C.A. § 1752(c) (West Supp. 1978), which dictates that in certain circumstances the present grazing user shall have a right of first refusal for any new lease, 43 CFR 4110.5 (43 FR 29070), must be read in pari materia therewith and with 43 CFR 4130.2(e) (43 FR 29072) to be construed as a valid regulation and must be interpreted not to apply where the present grazing user desires a new lease and otherwise meets the statutory and regulatory criteria.

Harvey Sheehan and Hazel Holland Mudon, 39 IBLA 56 (Jan. 16, 1979) 86 I.D. 51

The interpretation of an existing regulation by this Board to determine its applicability to the facts at hand does not constitute rulemaking by the Board.

H. R. Delasco, Inc., et al., 39 IBLA 194 (Feb. 2, 1979)

The maxim, expressio unius est exclusio alterius, will not be utilized to contradict or vary a clear expression of legislative intent.

Thomas R. Flickinger, William S. Flickinger, et al., 40 IBLA 53 (Mar. 16, 1979)

PUBLICATION

Neither a Recreation and Public Purposes Act classification nor a withdrawal is a rule or regulation within the ambit of the Secretarial policy of Apr. 27, 1971, which provides for utilization of the public participation procedures of 5 U.S.C. § 553 (1976).

Delmer McLean et al., 40 IBLA 34 (Mar. 15, 1979)

VALIDITY

In view of 43 U.S.C.A. § 1752(c) (West Supp. 1978), which dictates that in certain circumstances the present grazing user shall have a right of first refusal for any new lease, 43 CFR 4110.5 (43 FR 29070), must be read in pari materia therewith and with 43 CFR 4130.2(e) (43 FR 29072) to be construed as a valid regulation and must be interpreted not to apply where the present grazing user desires a new lease and otherwise meets the statutory and regulatory criteria.

Harvey Sheehan and Hazel Holland Mudon, 39 IBLA 56 (Jan. 16, 1979) 86 I.D. 51

REINSTATEMENT

GENERALLY

The burden of showing that the failure to pay annual rent for an oil and gas lease on or before the anniversary date of the lease was justifiable or not due to a lack of reasonable diligence is on the lessee. The fact that the lessee retained a leasing service which misrepresented that it would file appropriate assignment documents prior to the anniversary date does not justify late payment. Mailing of the annual rental payment on a date after it is due does not constitute reasonable diligence.

Saxe, Bacon and Bolan, P.C., 40 IBLA 5 (Mar. 6, 1979)

RES JUDICATA

Relitigation of the issue of discovery is barred by the principle of res judicata and its corollary, collateral estoppel, insofar as the same lands, parties, and claims are involved, absent compelling legal or equitable reasons for reconsideration.

Under principles of res judicata, a judgment is binding upon all parties to the proceedings in which it is rendered and to their privies. Privity denotes a mutual or successive relationship to the same right in property. Privity exists within the meaning of the doctrine of res judicata to bind a subsequent grantee, transferee, or lienor of property.

United States v. Leroy S. Johnson et al., 39 IBLA 337 (Feb. 28, 1979)

The principle of res judicata does not operate to bar consideration of a new Alaska Native allotment application under 43 U.S.C. §§ 270-1 through 270-3 (1970), despite previous denial of a prior application, when the initial adjudication was confined to a single issue, which issue is irrelevant under a later interpretation of the statute.

Rika Murphy, Gene H. Smagge, 42 IBLA 51 (July 31, 1979)

A summary dismissal of a private contest against an Alaska homestead becomes a final administrative ruling on that contest when the contestant, instead of appealing the dismissal, files a second contest which must be considered an entirely new action. When a final departmental adjudication has been made, the doctrine of administrative finality, which is the administrative counterpart of the principle of res judicata, generally bars consideration of a new appeal arising from a later proceeding involving the same homestead and the same issue.

Joe O. Amberger, 43 IBLA 178 (Sept. 28, 1979)

RIGHTS-OF-WAY

GENERALLY

Applications for rights-of-way on public lands pending on Oct. 22, 1976, are to be considered as applications under Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), but existing regulations will govern the administration of public lands to the extent practical until new regulations are promulgated.

As used in 43 CFR 2802.1-7, "fair market value" of a communication site right-of-way is the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the right to use the site would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user who desired but is not obligated to so use.

The comparable lease method of appraisal of microwave communication sites, which involves the comparison of comparable rental data from other leased sites with data from the subject site, is the preferred method of determining the fair market rental value of the right-of-way where there is sufficient comparable data available.

Appraisals of rights-of-way for communication sites will be upheld if no error is shown in the appraisal methods used by the Bureau of Land Management and the appellant fails to show by convincing evidence that the charges are excessive. Where an appellant has raised sufficient doubt that the Bureau properly considered the highest and best use of a right-of-way in determining comparability of other sites as a basis for the use

RIGHTS-OF-WAY--Continued

GENERALLY--Continued

charges, the case may be remanded for the Bureau to reconsider whether a further appraisal or adjustments in the appraised values should be made.

Where a grantee seeks renewal of a right-of-way for a communication site, the Bureau of Land Management should require an advance annual payment at the rate formerly charged until a new fair market value rate may be established by appraisal. In the absence of contrary directives, the guideline in 43 CFR 2802.1-7(e) should be applied to renewals of existing rights-of-way. Increased charges may not be imposed retroactively, but may be only imposed by the authorized officer, after reasonable notice and opportunity for hearing, beginning with the next charge year after the officer's decision.

Interest may be imposed on use charges for right-of-way sites depending on considerations of fairness and equity. In the absence of contrary directives, interest may be imposed for occupancy of a site where use charges should have been imposed at the same rate as past permitted use. Also, interest may be imposed on increased charges for the period commencing with the date from which increased charges are established.

Where, on appeal, application for renewal of communication site rights-of-way was approved subject to condition of a lump-sum payment of an increased rental without a hearing, the decisions below will be set aside and the cases remanded for hearing and for other revisions consistent with principles enunciated in Board decisions to be followed in renewal of communication site rights-of-way and in setting increases in the amount of rental for such sites.

Donald R. Clark, C. Reinhart & Son, Inc., Hartwell Excavating Co., 39 IBLA 182 (Jan. 31, 1979)

Pending applications for rights-of-way filed under the Acts of Feb. 15, 1901, and Mar. 4, 1911, shall be considered as applications under the Federal Land Policy and Management Act of 1976.

The granting of a right-of-way under FLPMA and the superseded Acts of Feb. 15, 1901, and Mar. 4, 1911, is within the Secretary's discretion and neither the filing of the application nor the existence of improvements earns appellant a right to the right-of-way. No rights vest in the applicant until the grant is approved by the Secretary. An application for a right-of-way is properly rejected where the land is in an interim conveyance to a Native Corporation.

"Public Lands." Land within an interim conveyance to a Native Corporation is no longer "public land" under the Federal Land Policy and Management Act nor subject to Bureau of Land Management jurisdiction to issue rights-of-way under that Act.

New England Fish Co., 42 IBLA 200 (Aug. 22, 1979)

ACT OF FEBRUARY 15, 1901

The Act of Feb. 15, 1901, 43 U.S.C. § 959 (1970), was repealed by sec. 706 of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2793, and any use or occupancy of public land granted subsequent to the effective date of FLPMA, Oct. 21, 1976, must be issued under authority of that Act. In authorizing the Secretary to grant rights-of-way, FLPMA provides that the Secretary shall require the applicant to submit certain information relating to the right-of-way, and a State Office notice enumerating such requirements is consistent with FLPMA.

William J. Colman, 40 IBLA 180 (Apr. 3, 1979)

RIGHTS-OF-WAY--Continued

ACT OF FEBRUARY 15, 1901--Continued

Pending applications for rights-of-way filed under the Acts of Feb. 15, 1901, and Mar. 4, 1911, shall be considered as applications under the Federal Land Policy and Management Act of 1976.

New England Fish Co., 42 IBLA 200 (Aug. 22, 1979)

ACT OF MARCH 4, 1911

Where there are multiple users on the same communication site each user is individually responsible for the fair market rental value of his authorized use.

The notice and opportunity for hearing envisaged by 43 CFR 2802.1-7(e) requires at a minimum that the lessee be provided with a copy of the appraisal report, that he be permitted to appear before the decisionmaker, that the decisionmaker not be the person who made or approved the appraisal, and that adequate records of the hearing conducted pursuant to the regulations be maintained.

Donald R. Clark, C. Reinhart & Son, Inc., Hartwell Excavating Co., 39 IBLA 182 (Jan. 31, 1979)

Pending applications for rights-of-way filed under the Acts of Feb. 15, 1901, and Mar. 4, 1911, shall be considered as applications under the Federal Land Policy and Management Act of 1976.

New England Fish Co., 42 IBLA 200 (Aug. 22, 1979)

APPLICATIONS

Given the specific facts presented by the right-of-way application, where the use of a large percentage (71% - 89%) of the reservoir water is not known, the Secretary cannot make an "informed decision" on the application, as required by Title V of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743 (Oct. 21, 1976), 43 U.S.C. § 1761 et seq. (1976) (FLPMA), and therefore may not proceed to consider the application.

The apparent discretion granted to the Secretary in sec. 1761 of FLPMA which states that the Secretary shall require such information "which he deems necessary" to grant a right-of-way must be interpreted in light of sec. 1764's specific mandate to submit a plan of operation, sec. 1765's specific mandate to include protective terms and conditions, and Congress reference to "the use, or intended use" of the right-of-way. Therefore, information about the intended use--as opposed to possible uses--of the water is necessary to the Secretary's decision whether to grant the application, under the circumstances presented by this case.

The Secretary could establish general policy in right-of-way regulations which would provide specific guidelines for determining how much uncertainty about use will prevent the processing of right-of-way applications.

Federal Land Policy and Management Act's Effect on the Right-of-Way Application for the Middle Fork Reservoir on the Powder River, Wyoming, M-36900 (Jan. 12, 1979)
86 I.D. 293

Under the Federal Land Policy and Management Act of 1976, approval for a right-of-way for a timber access road is discretionary. A decision by BLM rejecting such an application will be affirmed when the record shows the decision to be a reasoned analysis of the

RIGHTS-OF-WAY--Continued

APPLICATIONS--Continued

factors involved, made with due regard for the public interest.

Lowell Durham, 40 IBLA 209 (Apr. 10, 1979)

Pending applications for rights-of-way filed under the Acts of Feb. 15, 1901, and Mar. 4, 1911, shall be considered as applications under the Federal Land Policy and Management Act of 1976.

New England Fish Co., 42 IBLA 200 (Aug. 22, 1979)

CONDITIONS AND LIMITATIONS

The Secretary could establish general policy in right-of-way regulations which would provide specific guidelines for determining how much uncertainty about use will prevent the processing of right-of-way applications.

Federal Land Policy and Management Act's Effect on the Right-of-Way Application for the Middle Fork Reservoir on the Powder River, Wyoming, M-36900 (Jan. 12, 1979)
86 I.D. 293

The grant of a right-of-way to cross Federal land for a proposed pipeline which is neither Federally authorized nor funded is an "undertaking" within the meaning of the National Historic Preservation Act, as amended, 80 Stat. 915, 16 U.S.C. § 470 et seq. (1976). However, construction of segments of the pipeline which do not cross Federal land, and which are neither Federally licensed nor funded, is not an "undertaking" under that Act, and the provisions of that Act do not apply to such segments.

The Department of the Interior may condition approval of a right-of-way application for the construction of a gas pipeline by requiring acceptance of conditions for the protection of the public interest so long as such conditions are neither inconsistent with nor tend to unreasonably burden the proposed right-of-way.

Western Slope Gas Co., 40 IBLA 280 (Apr. 18, 1979)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

Given the specific facts presented by the right-of-way application, where the use of a large percentage (71% - 89%) of the reservoir water is not known, the Secretary cannot make an "informed decision" on the application, as required by Title V of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743 (Oct. 21, 1976), 43 U.S.C. § 1761 et seq. (1976) (FLPMA), and therefore may not proceed to consider the application.

The apparent discretion granted to the Secretary in sec. 1761 of FLPMA which states that the Secretary shall require such information "which he deems necessary" to grant a right-of-way must be interpreted in light of sec. 1764's specific mandate to submit a plan of operation, sec. 1765's specific mandate to include protective terms and conditions, and Congress reference to "the use, or intended use" of the right-of-way. Therefore, information about the intended use--as opposed to possible uses--of the water is necessary to the Secretary's decision whether to grant the application, under the circumstances presented by this case.

Federal Land Policy and Management Act's Effect on the Right-of-Way Application for the Middle Fork Reservoir on the Powder River, Wyoming, M-36900 (Jan. 12, 1979)
86 I.D. 293

RIGHTS-OF-WAY--Continued

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

Under the Federal Land Policy and Management Act of 1976, approval for a right-of-way for a timber access road is discretionary. A decision by BLM rejecting such an application will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest.

Lowell Durham, 40 IBLA 209 (Apr. 10, 1979)

Pending applications for rights-of-way filed under the Acts of Feb. 15, 1901, and Mar. 4, 1911, shall be considered as applications under the Federal Land Policy and Management Act of 1976.

New England Fish Co., 42 IBLA 200 (Aug. 22, 1979)

RULES OF PRACTICE

APPEALS

Generally

A mining claim contestee's allegation that BLM wrongly held a mining claim null and void ab initio will not be entertained where the contention is raised long after the time for appealing the decision has passed.

United States v. Jerry Prock et al., 39 IBLA 148 (Jan. 29, 1979)

A party adversely affected by a final order or decision of an officer of the Conservation Division of the Geological Survey has a right to appeal to the Director, Geological Survey, unless the decision was approved by the Secretary or Director prior to promulgation.

A party adversely affected by a final decision of the Director, Geological Survey, had a right of appeal to the Board of Land Appeals in the Office of Hearings and Appeals, Office of the Secretary.

Phoenix Resources Co., 39 IBLA 153 (Jan. 29, 1979)

Where Bureau of Land Management terminates a sodium lease because lessee failed to submit justification for holding a lease in excess of the acreage limitation, the decision will be set aside upon submission or explanation of failure to provide written information, and the case will be remanded for the State Office to determine whether the information submitted on appeal justifies continued lease tenure.

Olin Corp., 39 IBLA 161 (Jan. 29, 1979)

A notice of appeal must be filed within 30 days after appellant is served with the decision from which he is appealing. When a party does not appeal, the doctrine of administrative finality, the administrative equivalent of res judicata, generally bars consideration of the same issue in a later appeal.

Ralph and Ruth Dickinson, 39 IBLA 258 (Feb. 15, 1979)

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

Relitigation of the issue of discovery is barred by the principle of res judicata and its corollary, collateral estoppel, insofar as the same lands, parties, and claims are involved, absent compelling legal or equitable reasons for reconsideration.

Under principles of res judicata, a judgment is binding upon all parties to the proceedings in which it is rendered and to their privies. Privity denotes a mutual or successive relationship to the same right in property. Privity exists within the meaning of the doctrine of res judicata to bind a subsequent grantee, transferee, or lienor of property.

United States v. Leroy S. Johnson et al., 39 IBLA 337 (Feb. 28, 1979)

When a State Office rejects the offer of a first-drawn applicant in a drawing under the simultaneous oil and gas leasing program, an appeal by the applicant raises the issue of his qualifications to hold the lease. The qualifications of the second-drawn applicant are irrelevant until such time as the offer of the first-drawn applicant is rejected and all his avenues of appeal are exhausted. However, it is not improper for BLM to name the second-drawn applicant as an adverse party in a decision rejecting the first-drawn applicant.

Thomas R. Flickinger, William S. Flickinger, et al., 40 IBLA 53 (Mar. 16, 1979)

Where the holder of an oil and gas lease on the Outer Continental Shelf has filed a suit in a Federal district court to recover certain royalties paid under his lease, the Board of Land Appeals will affirm a decision of the Director, Geological Survey, holding in abeyance the lessee's request for a refund while the suit is pending.

Tenneco Oil Co., 41 IBLA 195 (June 22, 1979)

A decision by the Bureau of Land Management canceling fee simple patents issued to Indians and simultaneously issuing new Indian trust patents is not subject to review by the Board of Land Appeals, which has no jurisdiction in the matter, where the decision was made at the direction of the Assistant Secretary for Indian Affairs.

Blue Star, Inc., Atomic Western, Inc., Fremont Energy Corp., Ivor Adair, 41 IBLA 333 (July 11, 1979)

The principle of res judicata does not operate to bar consideration of a new Alaska Native allotment application under 43 U.S.C. §§ 270-1 through 270-3 (1970), despite previous denial of a prior application, when the initial adjudication was confined to a single issue, which issue is irrelevant under a later interpretation of the statute.

Rika Murphy, Gene H. Smagge, 42 IBLA 51 (July 31, 1979)

Mailing to the Bureau of Indian Affairs a carbon copy of a decision rejecting an application for an Alaska Native allotment is not service upon the applicant so as to comply with 43 CFR 4.401.

Gust J. Reft, Sr., 42 IBLA 86 (Aug. 13, 1979)

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

The relaxed procedural rules relating to the filing of statements of reasons for appeal in Native allotment cases enunciated in the letter of Sept. 24, 1975, and extended in the order of Nov. 26, 1976, IBLA 76-715, are hereby revoked. All future requests for extensions of time must comport with the regulations found at 43 CFR 4.22(f)(2).

Where, in a decision holding a Native allotment for approval and a State selection for rejection to the extent of a conflict, the Bureau of Land Management grants the State 30 days to initiate a private contest challenging the Native allotment, the 30-day appeal period will commence upon expiration of the 30 days accorded the State for initiation of a private contest and not with receipt of the decision.

Where it appears that a party did not realize that an election of remedies was mandated by Departmental procedures, a decision requiring the initiation of a private contest will be set aside, and the party will be permitted a period of time in which to initiate a private contest, or alternatively, waive such private contest and pursue a direct appeal on the question of whether a Government contest should issue.

State of Alaska et al., 42 IBLA 94 (Aug. 16, 1979)

Where an appellant admits in correspondence with the Department that the decision of the Bureau of Land Management State Office holding his mining claim invalid is correct, the appeal may be dismissed.

Ernest F. Hiniker, 43 IBLA 153 (Sept. 28, 1979)

Answers

The applicable regulation, 43 CFR 4.414 (1977), allows the Board some discretion in deciding whether to disregard the answer of an appellee who fails to file an answer within 30 days after service on him of the notice of appeal or statement of reasons and whose delay in filing is not waived under the provisions of 43 CFR 4.401(a) (1977).

California Portland Cement Co., Rosebud Coal Sales Co., 40 IBLA 339 (May 10, 1979)

Burden of Proof

A district manager's decision reached in the exercise of administrative discretion pursuant to the Taylor Grazing Act of 1934 may be regarded as arbitrary or capricious only where it is not supportable on any rational basis and the burden is on the appellant to show by substantial evidence that the decision is improper. A district manager's decision not to reissue a grazing lease for a certain area until that area is fenced and to reduce appellant's AUM's accordingly rests on a rational basis where the facts show that this unfenced area adjoins the bombing range and grazing thereon could result in trespass on the bombing range, inconsistent with the use of the range.

Colvin Cattle Co., Inc., 39 IBLA 176 (Jan. 30, 1979)

RULES OF PRACTICE--Continued

APPEALS--Continued

Burden of Proof--Continued

Applicant has burden of establishing entitlement to headquarters site claim, and must demonstrate that he has complied with statute and regulations.

United States v. Henry Jay Bush, 40 IBLA 106 (Mar. 27, 1979)

In review proceedings of notices of violation and cessation orders, the burden of going forward to establish a prima facie case rests with OSM and the ultimate burden of persuasion rests with the applicant for review.

Dean Trucking Co., Inc., 1 IBSMA 229 (Sept. 11, 1979) 86 I.D. 437

An appellant will be held to have failed to sustain its burden of proof and the appeal will be denied where appellant's case is submitted on the record without a hearing and the record consists only of claim letters and pleadings alleging that the contracting officer's findings of fact and decision are erroneous in certain respects. Disputed allegations do not constitute evidence and cannot be accepted as proof of facts.

Appeal of C.I.C. Construction Co., Inc., IBCA-1190-4-78 (Sept. 25, 1979) 86 I.D. 475

Dismissal

Where the Board of Land Appeals determines that matters raised in an appeal may become moot, or in any event, will be more clearly delineated by further action of BLM relating to subject matter of the appeal, such an appeal will be dismissed without prejudice to the appellant, subject to its right to assert its views in any future appeal to the Board.

State of Alaska, Department of Highways, 40 IBLA 48 (Mar. 15, 1979)

An appeal from a decision respecting a petition for deferment of assessment work on lode mining claims is properly dismissed where it appears that appellant has no interest in the claims.

Rasmussen Drilling, Inc., 40 IBLA 173 (Apr. 3, 1979)

A statement of reasons in support of an appeal which does not point out affirmatively in what respect the decision appealed from is in error does not meet the requirements of the Department's rules of practice and may be dismissed.

Duncan Miller, 41 IBLA 129 (June 13, 1979)

The Department has determined that an official of the Bureau of Indian Affairs is not entitled to represent a Native allotment applicant in an appeal to the Board of Land Appeals. However, where the case involves the propriety of proofs submitted by the Bureau of Indian Affairs in behalf of a deceased Native allotment applicant, that issue may be resolved.

Ernest L. Olson, Jr. (Deceased), 41 IBLA 179 (June 22, 1979)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

The Department has determined that an official of the Bureau of Indian Affairs is not entitled to represent a Native allotment applicant in an appeal to the Board of Land Appeals. However, where the partial rejection of an Alaska Native allotment application turns on the resolution of a factual issue, the case will be remanded to BLM so that heirs or claimants to the estate of the deceased applicant may be afforded notice and opportunity for hearing.

Unknown Heirs of Migley Kelly, 41 IBLA 387 (July 24, 1979)

An appeal is dismissed where the contractor has not shown any intent to appeal to an authority higher than the contracting officer from a final decision disallowing certain costs.

Appeal of Geer, Dubois, Inc., IBCA-1212-9-78 (July 27, 1979)

Where BLM fails to show that there was service of a decision rejecting an Alaska Native allotment and the applicant learns of his rejection 4-1/2 years after rejection, the applicant may file a timely appeal within 30 days of notice of the decision.

Gust J. Reft, Sr., 42 IBLA 86 (Aug. 13, 1979)

Effect of

The receipt of timber sale bids by BLM pursuant to an advertised sale and subsequent to the filing of a protest of the sale, does not constitute an irrevocable commitment to complete the sale where all bidders acknowledge that the final decision to award the sale contract is contingent upon adjudication of the protest and the decision reached on any proper appeal therefrom. Hence, receipt of bids by BLM does not prejudice the rights of protestants to have their protest ruled upon and any proper appeal heard.

Elaine Mikels et al., 41 IBLA 305 (July 3, 1979)

When an appeal is filed with the Board of Land Appeals from a decision made by an official of the Bureau of Land Management, that official loses jurisdiction of the case and has no further authority to take any action concerning it until his jurisdiction over the matter is restored by action dispositive of the appeal.

Warren D. Elmore, 42 IBLA 91 (Aug. 13, 1979)

Generally the Geological Survey may reconsider and modify or revoke its own decision in the absence of an appeal to the Board of Land Appeals. However, the filing of an appeal to the Board removes the matter from the jurisdiction of Survey pending disposition of the appeal.

Where Geological Survey and one of two parties to a compulsory unitization of two outer continental shelf oil and gas leases request a remand of a Survey decision for further consideration, and certain issues raised on appeal would appropriately be better first considered by Survey, the case will be remanded to Survey. In the circumstances, a request to stay implementation of Survey's prior decision may be granted by

RULES OF PRACTICE--Continued

APPEALS--Continued

Effect of--Continued

the Board unless and until Survey acts upon the request when it reconsiders the case.

Sun Oil Co., 42 IBLA 254 (Aug. 23, 1979)

Failure to Appeal

A notice of appeal must be filed within 30 days after appellant is served with the decision from which he is appealing. When a party does not appeal, the doctrine of administrative finality, the administrative equivalent of res judicata, generally bars consideration of the same issue in a later appeal.

Ralph and Ruth Dickinson, 39 IBLA 258 (Feb. 15, 1979)

An appeal is dismissed where the contractor has not shown any intent to appeal to an authority higher than the contracting officer from a final decision disallowing certain costs.

Appeal of Geer, Dubois, Inc., IBCA-1212-9-78 (July 27, 1979)

Where BLM fails to show that there was service of a decision rejecting an Alaska Native allotment and the applicant learns of his rejection 4-1/2 years after rejection, the applicant may file a timely appeal within 30 days of notice of the decision.

Gust J. Reft, Sr., 42 IBLA 86 (Aug. 13, 1979)

A summary dismissal of a private contest against an Alaska homestead becomes a final administrative ruling on that contest when the contestant, instead of appealing the dismissal, files a second contest which must be considered an entirely new action. When a final departmental adjudication has been made, the doctrine of administrative finality, which is the administrative counterpart of the principle of res judicata, generally bars consideration of a new appeal arising from a later proceeding involving the same homestead and the same issue.

Joe O. Amberger, 43 IBLA 178 (Sept. 28, 1979)

Hearings

Where, on appeal, application for renewal of communication site rights-of-way was approved subject to condition of a lump-sum payment of an increased rental without a hearing, the decisions below will be set aside and the cases remanded for hearing and for other revisions consistent with principles enunciated in Board decisions to be followed in renewal of communication site rights-of-way and in setting increases in the amount of rental for such sites.

Donald R. Clark, C. Reinhart & Son, Inc., Hartwell Excavating Co., 39 IBLA 182 (Jan. 31, 1979)

A request for a hearing on a Native allotment application will be denied where there are no facts in dispute and the sole question is a legal issue.

Lindberg Alexander, 41 IBLA 382 (July 23, 1979)

RULES OF PRACTICE--Continued

APPEALS--Continued

Hearings--Continued

The Board of Land Appeals has the discretion to grant a request for a hearing on issues of fact but, in order to warrant such a hearing, an appellant must at least allege facts which, if proved, would entitle him to the relief sought.

Mardelle M. Smith, Sherman C. Smith, 42 IBLA 136 (Aug. 16, 1979)

Where legal conclusions may be reached upon undisputed facts and there has been no proffer of further facts which could compel different legal conclusions, a request for a hearing is properly denied.

Sam Hanlon, Sr., 42 IBLA 161 (Aug. 17, 1979)

A second hearing of a Government mining contest will not be afforded where a claimant was given notice and an opportunity to appear at a hearing, where he was actually present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result. A petition to reopen a hearing of a Government mining contest will be denied when the contestee offers no valid justification for the neglect to offer evidence which was or could have been available at the original hearing. A further hearing will not be ordered merely to afford a claimant an additional opportunity to explore and make a discovery.

United States v. Andy Syndbad, 42 IBLA 313 (Aug. 29, 1979)

A request for a hearing on a Native allotment application will be denied where no factual dispute exists and all issues are legal ones.

Betty J. Thomrson, 43 IBLA 174 (Sept. 28, 1979)

Motions

A claim by a concessioner under a National Park Service Contract is dismissed as beyond the purview of the Board's jurisdiction where the contract contains no disputes clause and by its express terms the Contract Disputes Act of 1978 is not applicable to the claim asserted.

Appeal of Yosemite Park and Curry Co., IBCA-1232-12-78 (Mar. 16, 1979) 86 I.D. 197

An appeal is dismissed where the contractor has not shown any intent to appeal to an authority higher than the contracting officer from a final decision disallowing certain costs.

Appeal of Geer, Dubois, Inc., IBCA-1212-9-78 (July 27, 1979)

A contractor may not proceed under the provisions of the Contract Disputes Act of 1978 where the appeal is from a final decision of the contracting officer rendered and received by the appellant prior to the effective date of the Act.

Appeals of Gregory Lumber Co., Inc., IBCA-1237-12-78, 1238-12-78, 1239-12-78, 1240-12-78 (Sept. 28, 1979) 86 I.D. 520

RULES OF PRACTICE--Continued

APPEALS--Continued

Notice of Appeal

Where, in a decision holding a Native allotment for approval and a State selection for rejection to the extent of a conflict, the Bureau of Land Management grants the State 30 days to initiate a private contest challenging the Native allotment, the 30-day appeal period will commence upon expiration of the 30 days accorded the State for initiation of a private contest and not with receipt of the decision.

State of Alaska et al., 42 IBLA 94 (Aug. 16, 1979)

Reconsideration

When an appellant files a timely motion for reconsideration asking that an equitable adjustment be increased, the effect is to prevent finality from attaching to the original decision and the Board has jurisdiction to consider a Government response asking that the equitable allowance be reduced, even though the response was not filed within the 30-day period allowed for initial filing of a motion for reconsideration.

When arguments advanced in a motion for reconsideration convince the Board that the formula used in determining an equitable adjustment was not the most accurate method but where neither party submits a better method, the Board will vacate its original finding regarding the equitable adjustment and make a recomputation based on the evidence of record.

Appeal of J. A. LaPorte, Inc., IBCA-1146-3-77 (Feb. 14, 1979) 86 I.D. 125

Standing to Appeal

A group of individual landowners, whose lands assertedly abut a Federal tract which is offered for timber sale, have standing to appeal from a decision dismissing their protest against the proposed sale.

George Jalbert et al., 39 IBLA 205 (Feb. 2, 1979)

The characterization of a submission as an "appeal" or as a "protest" is not binding upon a State Office; rather, reference must be made to the nature of the submission to determine whether the submission is properly treated as an "appeal" or as a "protest."

Duncan Miller (On Reconsideration), 39 IBLA 312 (Feb. 23, 1979)

When a State Office rejects the offer of a first-drawn applicant in a drawing under the simultaneous oil and gas leasing program, an appeal by the applicant raises the issue of his qualifications to hold the lease. The qualifications of the second-drawn applicant are irrelevant until such time as the offer of the first-drawn applicant is rejected and all his avenues of appeal are exhausted. However, it is not improper for BLM to name the second-drawn applicant as an adverse party in a decision rejecting the first-drawn applicant.

Thomas R. Flickinger, William S. Flickinger, et al., 40 IBLA 53 (Mar. 16, 1979)

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

This Board approves the rule that a surety may prosecute and appeal in its own name when it enters into a takeover agreement to complete performance of a defaulted contract, but in the absence of such an agreement, the surety may appeal under the defaulted contract only in a representative capacity with the consent of its principal, the principal contractor on the defaulted contract.

Appeal of General Construction Corp. of America by Financial Indemnity Co. (Its Surety), IBCA-1178-2-78 (Mar. 29, 1979) 86 I.D. 206

The right of appeal to the Board is limited to parties to a case adversely affected by a decision of BLM. A person protesting a timber sale does not become a party to a case until such time as BLM has issued a final decision adverse to his or her interests. The case is ordinarily ripe for appeal only when an adverse decision is made on the protest.

Elaine Mikels et al., 41 IBLA 305 (July 3, 1979)

Statement of Reasons

A statement of reasons in support of an appeal which does not point out affirmatively in what respect the decision appealed from is in error does not meet the requirements of the Department's rules of practice and may be dismissed.

Duncan Miller, 41 IBLA 129 (June 13, 1979)

The relaxed procedural rules relating to the filing of statements of reasons for appeal in Native allotment cases enunciated in the letter of Sept. 24, 1975, and extended in the order of Nov. 26, 1976, IBLA 76-715, are hereby revoked. All future requests for extensions of time must comport with the regulations found at 43 CFR 4.22(f)(2).

State of Alaska et al., 42 IBLA 94 (Aug. 16, 1979)

Allegations on appeal will not be afforded favorable consideration where they are not stated with some particularity and supported by evidence.

New England Fish Co., 42 IBLA 200 (Aug. 22, 1979)

Timely Filing

When an appellant files a timely motion for reconsideration asking that an equitable adjustment be increased, the effect is to prevent finality from attaching to the original decision and the Board has jurisdiction to consider a Government response asking that the equitable allowance be reduced, even though the response was not filed within the 30-day period allowed for initial filing of a motion for reconsideration.

Appeal of J. A. LaPorte, Inc., IBCA-1146-3-77 (Feb. 14, 1979) 86 I.D. 125

RULES OF PRACTICE--Continued

APPEALS--Continued

Timely Filing--Continued

The applicable regulation, 43 CFR 4.414 (1977), allows the Board some discretion in deciding whether to disregard the answer of an appellee who fails to file an answer within 30 days after service on him of the notice of appeal or statement of reasons and whose delay in filing is not waived under the provisions of 43 CFR 4.401(a) (1977).

California Portland Cement Co., Rosebud Coal Sales Co., 40 IBLA 339 (May 10, 1979)

EVIDENCE

Where the evidence as to specific trespass indicates that of a number of cattle counted some were located on private intermingled land, but there were no barriers, either natural or artificial, which would have prevented the cattle on private land from going onto the public land, it is proper to find that all cattle counted would tend to consume forage at a rate proportional to the ratio of forage available on private and public lands.

Bureau of Land Management v. Holland Livestock Ranch et al., 39 IBLA 272 (Feb. 15, 1979) 86 I.D. 133

When on appeal a sufficient showing is made to call into question a determination that land lies within a known geologic structure of a producing oil or gas field, and a hearing is requested, the decision may be set aside and remanded for hearing.

Jack J. Bender, 40 IBLA 26 (Mar. 9, 1979)

Where a Native allotment application is filed before the death of an applicant, proof of the applicant's use and occupancy, if otherwise timely, may be filed by the appropriate official of the Bureau of Indian Affairs pursuant to 43 CFR 2561.2(a) after the applicant's death. A decision rejecting the application because the proof was filed after the applicant's death must be set aside where the proof is not inconsistent with the application. Further proceedings must be served upon the heirs, known or unknown, by appropriate service, and also upon conflicting claimants, such as the State of Alaska.

Ernest L. Olson, Jr. (Deceased), 41 IBLA 179 (June 22, 1979)

It was proper to deny mining claimants' request to redrill on mining claims after the land was withdrawn from mining where the work would be an effort to make a discovery of a valuable mineral deposit within the claim rather than simply a confirmation or corroboration of a discovery prior to the withdrawal.

United States v. William Lavon Chappell et al., 42 IBLA 74 (Aug. 13, 1979)

Evidence offered on appeal from an initial decision by an administrative law judge after a hearing in a contest may not be considered or relied upon in making a final decision but may only be considered to determine if there should be a further hearing.

Joe I. Sanchez and Celina V. Sanchez, et al., 42 IBLA 176 (Aug. 22, 1979)

RULES OF PRACTICE--Continued

EVIDENCE--Continued

In a mining claim contest where a contestee is of the opinion that the Government did not make a prima facie case of no discovery, he may move to have the case dismissed at the conclusion of the Government's case and then rest. The contest complaint could be dismissed if the administrative law judge rules that no prima facie case had been made of lack of discovery and there is no other evidence in the record to support the charges in the complaint. But if the contestee goes forward after making such a motion to dismiss and presents his evidence, that evidence must be considered as part of the entire record and its probative value will be weighed. Thus, even if the Government has failed to make a prima facie case, evidence presented by the contestee which supports the Government's contest charges may be used against the contestee, regardless of the defects in the Government's case.

United States v. Andy Syndbad, 42 IBLA 313 (Aug. 29, 1979)

An appellant will be held to have failed to sustain its burden of proof and the appeal will be denied where appellant's case is submitted on the record without a hearing and the record consists only of claim letters and pleadings alleging that the contracting officer's findings of fact and decision are erroneous in certain respects. Disputed allegations do not constitute evidence and cannot be accepted as proof of facts.

Appeal of C.I.C. Construction Co., Inc., IBCA-1190-4-78 (Sept. 25, 1979) 86 I.D. 475

GOVERNMENT CONTESTS

Failure to file a timely answer to a mining claim contest complaint will result in the charges in the complaint being taken as admitted and the case being decided without a hearing. Where contestees deny the allegations in the complaint only as to 4 claims but not as to 15 other claims addressed in the complaint, the complaint will be taken as admitted as to the 15 claims not addressed in the answer to the complaint.

Where contestees in a mining claim contest file a timely answer to the contest complaint, this answer is efficacious as to any other contestees who are members of his family if it appears on the face of the answer that they wish to retain their interests, if any, in the claims, as the contestees who answered may be regarded as having done so on their family members' behalf. In these circumstances, these other contestees are properly regarded as having answered the complaint, absent any manifestation of a contrary intent.

Where a contestee makes a timely response to a Government complaint in a mining contest which is sufficient to raise a justiciable controversy, the allegations then cannot be taken as admitted and the mining claim(s) cannot be declared null and void without a hearing.

United States v. Jerry Prock et al., 39 IBLA 148 (Jan. 29, 1979)

Where the Bureau of Land Management determines that an Alaska Native allotment application should be rejected because the land was not used and occupied by the applicant, the BLM shall issue a contest complaint pursuant to 43 CFR 4.451 et seq. Upon receiving a timely answer to the complaint, which answer raises a disputed issue of material fact, the Bureau will forward the case file to the Hearings Division, Office of Hearings and Appeals, Department of the Interior, for assignment of an administrative law judge, who will proceed to

RULES OF PRACTICE--Continued

GOVERNMENT CONTESTS--Continued

schedule a hearing, at which the applicant may produce evidence to establish entitlement to his allotment.

John Moore et al., 40 IBLA 321 (Apr. 30, 1979) 86 I.D. 279

Where Bureau of Land Management determines an application for a Native allotment should be rejected for failure to establish use and occupancy of the land, Bureau of Land Management should initiate a contest proceeding pursuant to 43 CFR 4.451 et seq.

Frederick Phillips et al., 41 IBLA 169 (June 22, 1979)

Ella S. Sheldon et al., 42 IBLA 276 (Aug. 27, 1979)

Where the Bureau of Land Management (BLM) determines that an Alaska Native allotment application should be rejected in part because the Native did not use all of the land applied for, the BLM shall initiate a contest proceeding pursuant to 43 CFR 4.451 et seq.

Frank Rulland, 41 IBLA 207 (June 27, 1979) 86 I.D. 342

Failure to file a timely answer to a mining claim contest complaint will result in the charges in the complaint being taken as admitted and the case being decided without a hearing.

United States v. James Hawkeswood et al., 41 IBLA 245 (June 27, 1979)

United States v. Edna Horstmeier, 42 IBLA 33 (July 26, 1979)

Where there is a conflict between an application by the State of Alaska to select land under the Statehood Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to BLM that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may not appeal from the "Notice," which is interlocutory, but it may initiate private contest proceedings to prove lack of qualification on the part of the Native, or it may appeal the subsequent decision of BLM to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient it will order the institution of Government contest proceedings, but if it finds the allotment application acceptable, it will order the patent issued, if all else be regular.

State of Alaska, 41 IBLA 309 (July 5, 1979)

Where there is a conflict between an application by the State of Alaska to select land under the Statehood Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to BLM that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may not appeal from an interlocutory decision which authorizes the State to initiate private contest proceedings to prove lack of qualification on the part of the Native. Rather, it may initiate the private contest within the time period prescribed, or it may appeal the decision of BLM, after it becomes final, to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient it will order the institution of Government contest proceedings, but if it

RULES OF PRACTICE--Continued

GOVERNMENT CONTESTS--Continued

finds the allotment application acceptable, it will order the patent issued, if all else be regular.

State of Alaska et al., 42 IBLA 94 (Aug. 16, 1979)

Where an applicant for a Native allotment alleges for the first time on appeal his use and occupancy of lands prior to their withdrawal, a decision rejecting the Native's application shall be vacated and the case remanded to BLM for its consideration of appellant's new evidence.

Charles L. John, 42 IBLA 260 (Aug. 27, 1979)

Where there is a conflict between an application by the State of Alaska to select land under the Alaska Mental Health Enabling Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to the Bureau of Land Management that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may initiate private contest proceedings to prove lack of qualification on the part of the Native, or it may appeal the determination to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient, it will order the institution of Government contest proceedings. If, however, the Board affirms the finding that the requirements of patent have been met, the State will have no further administrative recourse. Where the State had not, prior to its appeal, been afforded notice of the election, it should be afforded an opportunity to make such election.

State of Alaska v. Mattie B. Bartos, 42 IBLA 269 (Aug. 27, 1979)

State of Alaska v. Daniel Johnson, 42 IBLA 370 (Sept. 11, 1979) 86 I.D. 441

In a mining claim contest where a contestee is of the opinion that the Government did not make a prima facie case of no discovery, he may move to have the case dismissed at the conclusion of the Government's case and then rest. The contest complaint could be dismissed if the administrative law judge rules that no prima facie case had been made of lack of discovery and there is no other evidence in the record to support the charges in the complaint. But if the contestee goes forward after making such a motion to dismiss and presents his evidence, that evidence must be considered as part of the entire record and its probative value will be weighed. Thus, even if the Government has failed to make a prima facie case, evidence presented by the contestee which supports the Government's contest charges may be used against the contestee, regardless of the defects in the Government's case.

A sufficient prima facie case by the Government does not require positive proof that there has been no discovery made or that the mining claim is nonmineral in character. Upon the Government's presentation of a prima facie case, the burden shifts to the claimant to prove by a preponderance of the evidence that he indeed has a discovery of a valuable mineral deposit within the limits of the claim.

United States v. Andy Syndbad, 42 IBLA 313 (Aug. 29, 1979)

RULES OF PRACTICE--Continued

HEARINGS

The notice and opportunity for hearing envisaged by 43 CFR 2802.1-7(e) requires at a minimum that the lessee be provided with a copy of the appraisal report, that he be permitted to appear before the decisionmaker, that the decisionmaker not be the person who made or approved the appraisal, and that adequate records of the hearing conducted pursuant to the regulations be maintained.

Donald R. Clark, C. Reinhart & Son, Inc., Hartwell Excavating Co., 39 IBLA 182 (Jan. 31, 1979)

Where production has ceased on an oil and gas lease extended by production, and the record is unclear whether the conditions prescribed by 30 U.S.C. § 226(f) (1976) precluding termination of the lease have occurred, the case will be remanded to the Bureau of Land Management to reconsider with the Geological Survey if the lease has terminated, including a determination whether the lessee began reworking or drilling operations within 60 days after cessation of production and diligently prosecuted such operations before attaining production as asserted by him on appeal. A hearing should be held, if necessary, to resolve disputed facts.

Vern H. Bolinder and Julienne J. Bolinder, 40 IBLA 164 (Apr. 3, 1979)

Where the Geological Survey, in making its decision, has reviewed the same information submitted on appeal to the Board of Land Appeals to show that there was a well capable of producing oil or gas in paying quantities on the date the lease expired, and there are no disputed facts, but only a dispute on the proper application of the law to those facts and legal interpretations, a hearing is not warranted in the case.

American Resources Management Corp., 40 IBLA 195 (Apr. 5, 1979)

Alaska Natives who allege substantial use and occupancy of vacant, unappropriated, and unreserved public land in Alaska for a period of at least 5 years pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970), and the regulations at 43 CFR Subpart 2561 are entitled to notice and an opportunity for a hearing prior to rejection of their application. Such notice shall specify the reasons for the proposed rejection. Claimant shall have an opportunity to present evidence and testimony of favorable witnesses at a hearing before the trier of fact prior to a decision.

John Moore et al., 40 IBLA 321 (Apr. 30, 1979)
86 I.D. 279

When an Alaska Native allotment applicant alleges that there has been substantial use and occupancy of vacant, unappropriated, and unreserved public land in Alaska for a period of at least 5 years pursuant to 43 U.S.C. §§ 270-1 to 270-3 (1970) and 43 CFR Subpart 2561, and the Bureau of Land Management determines the application should be rejected because the land was not so used and occupied, the Native is entitled under contest procedures, 43 CFR 4.451, to notice and an opportunity for a hearing prior to rejection of his application.

Mary Bobby, 41 IBLA 44 (May 29, 1979)

Rika Murphy, Gene H. Smagge, 42 IBLA 51 (July 31, 1979)

RULES OF PRACTICE--Continued

HEARINGS--Continued

Where issues of material fact are in dispute, due process requires that an applicant for a Native allotment be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment.

Frederick Phillips et al., 41 IBLA 169 (June 22, 1979)

Ella S. Sheldon et al., 42 IBLA 276 (Aug. 27, 1979)

Where surface owners object to the amount of a bond, submitted to the Bureau of Land Management under sec. 9 of the Stock-Raising Homestead Act of Dec. 29, 1916, as amended, 43 U.S.C. § 299 (1970), as being inadequate in amount, request a hearing thereon, but fail to tender any evidence which would impel the conclusion that a hearing is likely to be productive and meaningful, the request for a hearing is properly denied.

Elmer Silvera et al., 42 IBLA 11 (July 25, 1979)

Two mining claims, located at a time when the land is withdrawn from mineral entry, may be properly declared null and void ab initio without a hearing. Such a result obtains despite reference to a location notice prior to the withdrawal where appellants do not make a showing of sufficient specific facts upon which to predicate a hearing, including which of the claims the previous location relates to, the boundaries thereof, whether the previous location was for a locatable mineral under a withdrawal order then in force, and the name of the previous locator.

The Heirs of M. K. Harris, 42 IBLA 44 (July 3, 1979)

The substantial use and occupancy required under the Native Allotment Act must be achieved by the Native himself as an independent citizen (or family head) and such use must be at least potentially exclusive of others. Although a minor may initiate such use and occupancy, use and occupancy by a dependent accompanied by his parents does not qualify.

Where a Native allotment application has been rejected, based on the guidelines of Oct. 18, 1973, on the basis that the applicant had not demonstrated 5 years use and occupancy of the land prior to the withdrawal affecting the land, and that requirement is abolished by Secretarial Order No. 3040, of May 25, 1979, the decision will be set aside and the case remanded for action.

Bella Nova, 42 IBLA 59 (Aug. 2, 1979)

Where issues of material fact are in dispute, due process requires that, before a decision is reached to reject an application for an allotment, the applicant for a Native allotment be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and granted an opportunity for an oral hearing before a trier of fact where evidence and testimony of favorable witnesses may be submitted.

A hearing will be afforded to a Native allotment applicant to show his/her entitlement to a Native allotment in view of court decisions requiring hearings on Native allotment applications. Where the applicant requests a hearing and alleges there are factual disputes concerning abandonment and nonuse of the claim, although the showings on the application show nonuse of the land for

RULES OF PRACTICE--Continued

HEARINGS--Continued

a lengthy period of time sufficient ordinarily to constitute a prima facie case for rejection of the application, a hearing is nevertheless mandated.

Mildred Sparks, 42 IBLA 155 (Aug. 19, 1979)

Evidence offered on appeal from an initial decision by an administrative law judge after a hearing in a contest may not be considered or relied upon in making a final decision but may only be considered to determine if there should be a further hearing.

Joe I. Sanchez and Celina V. Sanchez, et al., 42 IBLA 176 (Aug. 22, 1979)

A hearing is properly ordered where there exist issues of fact the resolution of which will determine whether an oil and gas lease concluding its primary term was converted from rental status to royalty status. Appellant shall have the burden of proof to establish by a preponderance of the evidence (a) that the Dolezal-Government #1 well was capable of producing oil and gas in paying quantities on Oct. 31, 1978, or (b) that there was a discovery of oil or gas in paying quantities on lease W 15891 on Oct. 31, 1978. If either (or both) of these propositions is established, the subject lease was not subject to automatic termination by law for failure to make timely rental payment.

Coronado Oil Co., 42 IBLA 235 (Aug. 22, 1979)

A second hearing will not be afforded where a mining claimant had notice of and appeared at the first hearing and no evidence has been submitted suggesting another hearing would produce a different result.

United States v. Howard D. Long, Dolores M. Killion, 43 IBLA 150 (Sept. 28, 1979)

PRIVATE CONTESTS

Regulation 43 CFR 4.450-1 gives a person with an adverse interest in land a right to contest an adverse claim. The Department of the Interior has consistently recognized States as included within the term "person" within the meaning of the regulation, allowing them to initiate private contests.

Where the State of Alaska has shown an interest in land in its existing airport, it may bring a private contest to challenge Native allotment applications for land in conflict with the airport.

State of Alaska, 40 IBLA 79 (Mar. 22, 1979)

The State of Alaska will be afforded time within which to bring private contests against Native allotment applications conflicting with an existing airport runway built by the State and to show it has standing to contest. If it does so timely, the Bureau of Land Management will adjudicate its standing as a contestant and the contests will proceed if it finds affirmatively. If not, the State's timely objections will be taken as a protest and a factfinding hearing will be held. If the State fails to take timely action, a decision rejecting its application to reinstate a conflicting airport lease application will stand.

State of Alaska, 40 IBLA 118 (Mar. 27, 1979)

RULES OF PRACTICE--Continued

PRIVATE CONTESTS--Continued

Where there is a conflict between an application by the State of Alaska to select land under the Statehood Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to BLM that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may not appeal from the "Notice," which is interlocutory, but it may initiate private contest proceedings to prove lack of qualification on the part of the Native, or it may appeal the subsequent decision of BLM to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient it will order the institution of Government contest proceedings, but if it finds the allotment application acceptable, it will order the patent issued, if all else be regular.

State of Alaska, 41 IBLA 309 (July 5, 1979)

Under the "functional" standard to determine administrative standing set forth in Koniag, Inc. v. Andrus, 580 F.2d 601 (D.C. Cir. 1978), cert. denied, 99 S. Ct. 733 (1979), the State of Alaska has standing to challenge Native allotment applications conflicting with its selection applications even if the land is within a Native village selection area under the Alaska Native Claims Settlement Act. The State has standing under Departmental regulations to initiate private contests against such conflicting Native allotment applications.

"Person." A State is a "person" within the meaning of the Department's private contest regulations.

State of Alaska et al., 41 IBLA 315 (July 11, 1979)
86 I.D. 361

"Person." Regulation 43 CFR 4.450-1 specifically gives persons with an adverse interest in land a right to contest the adverse claim. It does not depend on the applicability of the due process clause of the Constitution to either claimant. A State is a "person" within the meaning of this private contest regulation.

The State of Alaska has a sufficient interest in land by virtue of its applications for an airport conveyance or by its selection application to have standing to initiate private contests against conflicting Native allotment applications.

State of Alaska, 42 IBLA 1 (July 25, 1979)

The owner of a patented stock-raising homestead, in which the minerals have been reserved to the United States under the Act of Dec. 29, 1916, as amended, has a sufficient adverse interest under 43 CFR 4.450-1, to initiate a contest against a mining claimant, alleging lack of discovery of valuable minerals.

The issue of whether a mining claim has been perfected by discovery of available mineral has no place in a proceeding to determine whether the amount of a stock-raising homestead bond is sufficient.

Elmer Silvera et al., 42 IBLA 11 (July 25, 1979)

Where there is a conflict between an application by the State of Alaska to select land under the Statehood Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to BLM that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may not appeal from an interlocutory decision which authorizes

RULES OF PRACTICE--Continued

PRIVATE CONTESTS--Continued

the State to initiate private contest proceedings to prove lack of qualification on the part of the Native. Rather, it may initiate the private contest within the time period prescribed, or it may appeal the decision of BLM, after it becomes final, to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient it will order the institution of Government contest proceedings, but if it finds the allotment application acceptable, it will order the patent issued, if all else be regular.

State of Alaska et al., 42 IBLA 94 (Aug. 16, 1979)

Where there is a conflict between an application by the State of Alaska to select land under the Alaska Mental Health Enabling Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to the Bureau of Land Management that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may initiate private contest proceedings to prove lack of qualification on the part of the Native, or it may appeal the determination to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient, it will order the institution of Government contest proceedings. If, however, the Board affirms the finding that the requirements of patent have been met, the State will have no further administrative recourse. Where the State had not, prior to its appeal, been afforded notice of the election, it should be afforded an opportunity to make such election.

State of Alaska v. Mattie B. Bartos, 42 IBLA 269 (Aug. 27, 1979)

State of Alaska v. Daniel Johnson, 42 IBLA 370 (Sept. 11, 1979) 86 I.D. 441

A private contest brought against an Alaska homestead charging that the entryman had failed to meet any of the residence or cultivation requirements of the law must be dismissed where the statutory life of the entry has previously expired without the entryman filing final proof and information was already of record in the BLM office that the entryman had done nothing during the life of the entry to perfect the claim. 43 CFR 4.450-1.

Joe O. Amberger, 43 IBLA 178 (Sept. 28, 1979)

PROTESTS

A group of individual landowners, whose lands assertedly abut a Federal tract which is offered for timber sale, have standing to appeal from a decision dismissing their protest against the proposed sale.

George Jalbert et al., 39 IBLA 205 (Feb. 2, 1979)

The characterization of a submission as an "appeal" or as a "protest" is not binding upon a State Office; rather, reference must be made to the nature of the submission to determine whether the submission is properly treated as an "appeal" or as a "protest."

Duncan Miller (On Reconsideration), 39 IBLA 312 (Feb. 23, 1979)

RULES OF PRACTICE--Continued

PROTESTS--Continued

The State of Alaska will be afforded time within which to bring private contests against Native allotment applications conflicting with an existing airport runway built by the State and to show it has standing to contest. If it does so timely, the Bureau of Land Management will adjudicate its standing as a contestant and the contests will proceed if it finds affirmatively. If not, the State's timely objections will be taken as a protest and a factfinding hearing will be held. If the State fails to take timely action, a decision rejecting its application to reinstate a conflicting airport lease application will stand.

State of Alaska, 40 IBLA 118 (Mar. 27, 1979)

The right of appeal to the Board is limited to parties to a case adversely affected by a decision of BLM. A person protesting a timber sale does not become a party to a case until such time as BLM has issued a final decision adverse to his or her interests. The case is ordinarily ripe for appeal only when an adverse decision is made on the protest.

The receipt of timber sale bids by BLM pursuant to an advertised sale and subsequent to the filing of a protest of the sale, does not constitute an irrevocable commitment to complete the sale where all bidders acknowledge that the final decision to award the sale contract is contingent upon adjudication of the protest and the decision reached on any proper appeal therefrom. Hence, receipt of bids by BLM does not prejudice the rights of protestants to have their protest ruled upon and any proper appeal heard.

Elaine Mikels et al., 41 IBLA 305 (July 3, 1979)

A bond filed by a mining claim owner, covering lands patented under the Stock-Raising Homestead Act of Dec. 29, 1916, as amended, 43 U.S.C. §§ 291-301 (1970), need only be set in an amount to cover damages to crops, improvements, and the value of the land for grazing purposes within the limits of the mining claim. The ad damnum of the bond does not have to be sufficient to cover damages caused by a disruption of the surface owner's entire grazing operation.

Elmer Silvera et al., 42 IBLA 11 (July 25, 1979)

SUPERVISORY AUTHORITY OF THE SECRETARY

Where the Secretary has declined to exercise his jurisdiction, a decision rendered by this Board is final for the Department. Hence, statements by BLM and arguments of the Solicitor, while valuable to the Board, are not binding upon the Board.

H. R. Delasco, Inc., et al., 39 IBLA 194 (Feb. 2, 1979)

SECRETARY OF THE INTERIOR

Under the Supremacy Clause, U.S. CONST., art. VI, cl. 2, Federal laws, including Federal grazing regulations, override conflicting State laws with respect to public lands.

Colvin Cattle Co., Inc., 39 IBLA 176 (Jan. 30, 1979)

SECRETARY OF THE INTERIOR--Continued

Where the Secretary has declined to exercise his jurisdiction, a decision rendered by this Board is final for the Department. Hence, statements by BLM and arguments of the Solicitor, while valuable to the Board, are not binding upon the Board.

H. R. Delasco, Inc., et al., 39 IBLA 194 (Feb. 2, 1979)

The failure of the BLM officer to follow the procedure set out in a Secretarial Order requiring all offers, prior to issuance of a lease, to be sent to Geological Survey for a determination of whether the lands are within a known geologic structure, renders the signing of the lease unauthorized, and thus not binding on the Secretary.

United States v. William T. Alexander (On Court Remand), 41 IBLA 1 (May 21, 1979)

A decision by the Bureau of Land Management canceling fee simple patents issued to Indians and simultaneously issuing new Indian trust patents is not subject to review by the Board of Land Appeals, which has no jurisdiction in the matter, where the decision was made at the direction of the Assistant Secretary for Indian Affairs.

Blue Star, Inc., Atomic Western, Inc., Fremont Energy Corp., Ivor Adair, 41 IBLA 333 (July 11, 1979)

The Taylor Grazing Act, 43 U.S.C. §§ 315a-315r (1970), and other statutory authority empower the Secretary of the Interior to define what conduct constitues a grazing trespass and whether or not an individual has committed a trespass.

Bureau of Land Management v. Harris Brothers, 42 IBLA 48 (July 31, 1979)

A decision rejecting a Native allotment application because there was not 5 years of use and occupancy of the land prior to a withdrawal affecting the land, will be set aside and the case remanded to the Bureau of Land Management for readjudication in accordance with Secretarial Order No. 3040 of May 25, 1979, which rescinds a former guideline requiring the 5 years prior to the withdrawal and now permits allotment after 5 years' use and occupancy has been completed provided the applicant had either filed an application or commenced use and occupancy prior to a withdrawal.

Ella S. Sheldon et al., 42 IBLA 276 (Aug. 27, 1979)

The Secretary of the Interior has plenary authority over the public lands, including mineral lands, and has been entrusted with the function of making the initial determination of the validity of claims against such lands.

United States v. Edward T. McHenry et al., 43 IBLA 122 (Sept. 26, 1979)

SEGREGATION-

GENERALLY

A mining claim located on land at a time when the land is segregated from mining location by a State selection

SEGREGATION--Continued

GENERALLY--Continued

application is properly declared null and void ab initio.

W. Ted Hackett, 39 IBLA 28 (Jan. 11, 1979)

Prior to passage of the Multiple Mineral Development Act, 30 U.S.C. §§ 521-31 (1976), a prima facie valid mineral lease, or application therefor, though void and ineffectual to vest any rights to minerals subject to the mining laws in the lessee segregated the land from the operation of the mining laws and prevented the initiation of rights under the mining laws by another person until it had been set aside and removed from the records of the land office.

Charles House, Mrs. Leonard Skinner, 42 IBLA 364 (Sept. 11, 1979)

FILING OF APPLICATION

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of a State's application to select lands segregates these lands from all subsequent appropriation, including locations under the mining laws.

Joe D. Denson, 43 IBLA 136 (Sept. 28, 1979)

SETTLEMENTS ON PUBLIC LANDS

A Native allotment applicant, who was 5 years old at the time when the land was withdrawn from all forms of appropriation, is properly deemed to be incapable as a matter of law of having exerted independent use and occupancy of the land to the exclusion of others prior to the withdrawal and consequently the allotment application is properly rejected.

An allotment right is personal to one who has complied with the laws and regulations. An applicant for a Native allotment may not rely or tack on use and occupancy of the land by his ancestors to establish his right.

Floyd L. Anderson, Sr., 41 IBLA 280 (June 28, 1979)
86 I.D. 345

An allotment right is personal to one who has complied with the laws and regulations. An applicant for a Native allotment may not rely on or tack on use and occupancy of the land by his ancestors to establish his right.

A Native allotment applicant, who was 5 years old at the time when the land was withdrawn from all forms of appropriation, is properly deemed to be incapable as a matter of law of having exerted indepeudeut use and occupancy of the land to the exclusion of others prior to the withdrawal and consequently the allotment application is properly rejected.

Public Land Order No. 2213 of Dec. 8, 1960, establishing the Kuskokwim National Wildlife Range withdrew certain lands from all forms of appropriation under the public land laws, and although such order preserved to Natives the right to hunt, fish, and trap thereon, the lands were no longer subject to initiation of rights under the Native Allotment Act once the order became effective.

Peter Panruk, 43 IBLA 69 (Sept. 19, 1979)

SODIUM LEASES AND PERMITS

LEASES

Where Bureau of Land Management terminates a sodium lease because lessee failed to submit justification for holding a lease in excess of the acreage limitation, the decision will be set aside upon submission or explanation of failure to provide written information, and the case will be remanded for the State Office to determine whether the information submitted on appeal justifies continued lease tenure.

Olin Corp., 39 IBLA 161 (Jan. 29, 1979)

SOLICITOR, DEPARTMENT OF THE INTERIOR

Where the Secretary has declined to exercise his jurisdiction, a decision rendered by this Board is final for the Department. Hence, statements by BLM and arguments of the Solicitor, while valuable to the Board, are not binding upon the Board.

H. R. Delasco, Inc., et al., 39 IBLA 194 (Feb. 2, 1979)

SPECIAL USE PERMITS

Where an application for a special use permit is not filed until more than 10 months after a deadline for doing so imposed by BLM, it is properly rejected.

Where a permittee is not familiar with an unpublished BLM policy to the effect that the tardy filing of an application for permit renewal in 1978 makes the permittee a "new" applicant in 1979 and, as such, ineligible to receive a permit, BLM's decision enforcing this policy and rejecting the permittee's 1979 application will be reversed.

Outdoor Adventure River Specialists, Inc., 41 IBLA 132 (June 14, 1979)

The issuance of special use permits is discretionary and BLM may properly reject a permit application if the use identified is inconsistent with BLM's objectives, responsibilities and programs for managing the public lands. BLM may propose alternatives or impose restrictions or stipulations in order to issue a permit consistent with its responsibilities.

Southern California Motorcycle Club, Inc., Sierra Club, 42 IBLA 164 (Aug. 17, 1979)

STATE LAWS

Under the Supremacy Clause, U.S. CONST., art. VI, cl. 2, Federal laws, including Federal grazing regulations, override conflicting State laws with respect to public lands.

Colvin Cattle Co., Inc., 39 IBLA 176 (Jan. 30, 1979)

A provision of State law, relating to assessment work on mining claims, which is more liberal than the requirements of Federal law, cannot override such Federal law. Article IV, § 3, cl. 2, of the Federal Constitution vests in the Congress authority to promulgate appropriate laws governing the public lands and other property of the United States.

Bruce Parke, 42 IBLA 18 (July 25, 1979)

STATE LAWS--Continued

The State laws applicable to Federal oil and gas leases are limited to those classes of laws authorized or recognized by sec. 32 of the Mineral Leasing Act, as amended, 30 U.S.C. § 189 (1976).

Lamar M. Richardson, Jr., 42 IBLA 333 (Aug. 30, 1979)

A State law which requires filing of proof of assessment work which requirement is more liberal than the recordation requirement of the Federal Land Policy and Management Act of 1976, § 314a, 43 U.S.C. § 1744 (1976), cannot override the more onerous requirements of the latter, since Article VI, Clause 2 of the Federal Constitution makes the Constitution, and laws and treaties made in conformity therewith, the supreme law of the land.

James V. Joyce, 42 IBLA 383 (Sept. 11, 1979)

STATE SELECTIONS

Where the State is a party to decisions by the Bureau of Land Management and the State's selection applications were rejected by those decisions, under 43 CFR 4.410, the State has standing to appeal those decisions to the Board of Land Appeals.

The Alaska Native Claims Settlement Act extinguished aboriginal occupancy claims of Alaska Natives; such claims cannot serve as a bar to a State selection, nor preclude the State from challenging Native allotment applications conflicting with its selection.

Under the "functional" standard to determine administrative standing set forth in Koniag, Inc. v. Andrus, 580 F.2d 601 (D.C. Cir. 1978), cert. denied, 99 S. Ct. 733 (1979), the State of Alaska has standing to challenge Native allotment applications conflicting with its selection applications even if the land is within a Native village selection area under the Alaska Native Claims Settlement Act. The State has standing under Departmental regulations to initiate private contests against such conflicting Native allotment applications.

State of Alaska et al., 41 IBLA 315 (July 11, 1979)
86 I.D. 361

The State of Alaska has a sufficient interest in land by virtue of its applications for an airport conveyance or by its selection application to have standing to initiate private contests against conflicting Native allotment applications.

State of Alaska, 42 IBLA 1 (July 25, 1979)

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of a State's application to select lands segregates these lands from all subsequent appropriation, including locations under the mining laws.

Joe D. Denson, 43 IBLA 136 (Sept. 28, 1979)

STATE TAXES

Public lands owned by the United States cannot be subjected to taxation by the State in which they are located. When Congress has prescribed the conditions upon which portions of the public domain may be alienated and has provided that upon fulfillment of certain

STATE TAXES--Continued

conditions the United States shall issue patent, the land becomes taxable only after the applicant has fulfilled all conditions precedent to such conveyance. Payment of taxes to a State for Federal land does not afford the taxpayer any rights against the United States, unless specifically provided by a Federal statute.

Joseph Tomalino, August Sobotka, 42 IBLA 117 (Aug. 16, 1979)

STATUTORY CONSTRUCTION

GENERALLY

When interpreting Federal agreements and statutes pertaining to Indian Affairs, one must consider the legislative history, as well as surrounding circumstances and subsequent administrative practices to determine what the parties intended, and in particular, what the Indians understood the agreement to mean. Doubtful expressions are to be resolved in the Indians' favor.

Congressional intent to modify or abrogate Indian property rights must be clear and cannot be lightly inferred.

Sec. 25 of the Act of Apr. 21, 1904 (33 Stat. 189, 224), which authorized the application of the 1902 Reclamation Act to the Fort Yuma and Colorado River Reservations, and which provided for the allotment and sale of surplus irrigable lands on those reservations, was unrelated to and was not intended to effect the conditional cession provided for in the 1893 agreement and the 1894 ratifying statute.

Title to Certain Lands Within the Boundaries of the Fort Yuma (now called Quechan) Indian Reservation, M-36908 (Jan. 2, 1979) 86 I.D. 3

Snbseqnent to the passage of the Federal Land Policy and Management Act of 1976 (FLPMA), the Department lacked the authority to accept donations of land nnder the Act of July 14, 1960, which had been expressly repealed by FLPMA. Inasmuch as the actions of the Secretary under the Act of July 14, 1960, were not ministerial, the doctrine of relation cannot be used to validate, on a nunc pro tunc basis, an acceptance of a donation under the authority of the Act of July 14, 1960, occurring after the repeal of that Act by Congress.

Jnnior L. Dennis, 40 IBLA 12 (Mar. 9, 1979)

ADMINISTRATIVE CONSTRUCTION

In determining whether interpretation of a statnte should be given prospective effect, some of the factors to be considered are whether the statute is easily susceptible to more than one interpretation; whether the interpretation being overruled has been followed since enactment of the statute; the nature of the reliance placed on the precedent by the parties; the purpose of the statute or rule in light of public policy; the harm to the parties who have relied on the precedent to their detriment; and the harm either to the Government or the public purpose.

Reclamation Law - Control of the Sale Price of Formerly Excess Lands, M-36913 (May 18, 1979) 86 I.D. 306

STOCK-RAISING HOMESTEADS

A bond filed by a mining claim owner, covering lands patented under the Stock-Raising Homestead Act of Dec. 29, 1916, as amended, 43 U.S.C. §§ 291-301 (1970), need only be set in an amount to cover damages to crops, improvements, and the value of the land for grazing purposes within the limits of the mining claim. The ad damnum of the bond does not have to be sufficient to cover damages caused by a disruption of the surface owner's entire grazing operation.

Elmer Silvera et al., 42 IBLA 11 (July 25, 1979)

SUBMERGED LANDS

Federal title to land may be lost by erosion, and land which has become submerged under water is no longer subject to disposition under the Alaska Native Allotment Act. The fact that an Alaska Native may have used, occupied, and filed an application for such land when it was dry does not prevent the loss of Federal title to that land by erosion. Neither the Alaska Statehood Act nor the Submerged Lands Act prevents the passage of title to such land to the State.

Frank Rulland, 41 IBLA 207 (June 27, 1979) 86 I.D. 342

The Mineral Leasing Act for Acquired Lands does not exclude from oil and gas leasing those lands underlying the Missouri River within the boundaries of the Fort Berthold Indian Reservation as established by the Treaty of Fort Laramie (1851) and the Executive Order of Apr. 12, 1870, which were reacquired by the United States from the Indian tribes. The exclusion in the Act for submerged lands refers to submerged coastal lands, as set forth in 43 CFR 3101.2-1(g).

Impel Energy Corp., 42 IBLA 105 (Aug. 16, 1979)

SUBMERGED LANDS ACT

GENERALLY

Where submerged lands were included in a withdrawal order in Alaska, which was in effect at the time the State entered the Union, even though such submerged lands were not specifically described in the withdrawal order, such submerged lands would not pass to the State at statehood pursuant to sec. 5(a) of the Submerged Lands Act.

The subseqnent revocation of a withdrawal of submerged lands which prevented the State from acquiring title to such lands at statehood pursuant to sec. 5(a) of the Submerged Lands Act, has no effect on the ownership of the lands contained in the withdrawal.

Where the coastal submerged lands in the Arctic National Wildlife Refnge were segregated by an application for a withdrawal filed by the Fish and Wildlife Service in Jan. 1958, 1 year before Alaska statehood, such application operated as an express retention of the lands at statehood under the Submerged Lands Act, and prevented passage of title of the coastal submerged lands to the State.

The Effect of Public Land Order 82 on the Ownership of Coastal Submerged Lands in Northern Alaska, M-36911 (Dec. 12, 1978) 86 I.D. 151 (1979)

SUBMERGED LANDS ACT--Continued

GENERALLY--Continued

Federal title to land may be lost by erosion, and land which has become submerged under water is no longer subject to disposition under the Alaska Native Allotment Act. The fact that an Alaska Native may have used, occupied, and filed an application for such land when it was dry does not prevent the loss of Federal title to that land by erosion. Neither the Alaska Statehood Act nor the Submerged Lands Act prevents the passage of title to such land to the State.

Frank Rulland, 41 IBLA 207 (June 27, 1979) 86 I.D. 342

The Board adopts the Solicitor's conclusion that Public Land Order No. 82 (Jan. 22, 1943) (8 FR 1599 (Feb. 4, 1943)) constituted an express retention for the United States of submerged lands when Alaska was admitted to the Union, and title to the submerged lands withdrawn by PLO No. 82 did not pass to the State of Alaska with statehood.

Regulations in 43 CFR 2650.5-1(b) deal explicitly with chargeability of acreage and implicitly with land title, establishing two categories of submerged lands not required to be selected and charged: those underlying navigable waters, and those underlying nonnavigable waters of one-half section or more.

Under regulations in 43 CFR 2650.5-1(b), Federal ownership of submerged lands does not require all such lands to be charged against a Native corporation's acreage entitlement.

Appeal of State of Alaska, 3 ANCAB 297 (July 31, 1979) 86 I.D. 381

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

ADMINISTRATIVE PROCEDURE

Generally

An administrative law judge may raise questions which go to the authority of the Department under the Act even if the parties fail to raise those questions.

If a party objects to any ruling of or action taken by an administrative law judge it should do so in a manner that the administrative law judge can reconsider his action in light of that objection.

It is imperative both to the just implementation of this Act and to the proper functioning of administrative review within the Department that parties cooperate with the administrative law judge's conduct of the proceeding and with his requests.

Delight Coal Corp., 1 IBSMA 186 (June 5, 1979) 86 I.D. 321

In a case on appeal, the Board bases its deliberations on the record before it.

Where the applicant for review bases his defense upon the assertion that the amount of coal removed or to be removed is less than that provided by law to constitute surface coal mining, he must prove such an assertion.

James Moore, 1 IBSMA 216 (July 20, 1979) 86 I.D. 369

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 --Continued

ADMINISTRATIVE PROCEDURE--Continued

Generally--Continued

In review proceedings of notices of violation and cessation orders, the burden of going forward to establish a prima facie case rests with OSM and the ultimate burden of persuasion rests with the applicant for review.

Dean Trucking Co., Inc., 1 IBSMA 229 (Sept. 11, 1979) 86 I.D. 437

Findings

The administrative law judge may frame findings of fact in any of a number of acceptable ways, but, however they are arrived at, findings must be sufficiently comprehensive and pertinent to form a basis for decision when measured against the evidence.

Dean Trucking Co., Inc., 1 IBSMA 105 (Mar. 23, 1979) 86 I.D. 201

Except in cases governed by 43 CFR 4.1187(e) or 4.1266(b)(7)(ii), a written decision or a written order confirming a ruling from the bench constitutes the initial decision. The written decision or order incorporating the ruling from the bench must comply with 43 CFR 4.1127. The only exception to this rule is when the administrative law judge both specifically states that a ruling from the bench constitutes his initial decision and fully complies with the requirements of 43 CFR 4.1127 in that oral ruling.

Delight Coal Corp., 1 IBSMA 186 (June 5, 1979) 86 I.D. 321

In review proceedings of cessation orders issued pursuant to sec. 521(a)(2) of the Surface Mining Control and Reclamation Act of 1977, there must be a determination whether the condition, practice, or violation which is the basis for the order is one which creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

Claypool Construction Co., Inc., 1 IBSMA 259 (Sept. 26, 1979) 86 I.D. 486

APPLICABILITY

Enforcement Provisions

The enforcement provisions of the Act and the initial Federal regulatory program are not avoided by the failure of a person to obtain a State permit before conducting surface coal mining and reclamation operations regulated by a State.

Claypool Construction Co., Inc., 1 IBSMA 259 (Sept. 26, 1979) 86 I.D. 486

Postmining Land Use

Excavation for the purpose of obtaining coal is an activity which may be subject to regulation under the Act, even though that activity may be incidental to a postmining land use plan.

Claypool Construction Co., Inc., 1 IBSMA 259 (Sept. 26, 1979) 86 I.D. 486

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ATTORNEYS' FEES

Bad Faith

An award of costs and expenses including attorneys' fees may be awarded to a permittee from OSM only if the permittee establishes that OSM took enforcement action in bad faith and for the purpose of harassing or embarrassing the permittee.

Dennis R. Patrick, 1 IBSMA 248 (Sept. 14, 1979) 86 I.D. 450

BACKFILLING AND GRADING REQUIREMENTS

Previously-mined Lands

The backfilling and grading requirements of 30 CFR 715.14 apply only to lands which are used, disturbed, or redisturbed in connection with or to facilitate mining or to comply with the requirements of the Act or Federal interim regulations, and do not apply to previously mined lands on which no adverse physical impact results from surface coal mining and reclamation operations conducted after the effective date of the Federal initial performance requirements.

Cedar Coal Co., 1 IBSMA 145 (Apr. 20, 1979) 86 I.D. 250

CIVIL PENALTIES

Generally

During the initial regulatory program a person may be assessed a civil penalty under 30 CFR 723.1 for violations of a permit condition, a regulation, or a provision of Title V of the Act even though he does not hold a permit from the State regulatory authority.

Delight Coal Corp., 1 IBSMA 186 (June 5, 1979) 86 I.D. 321

Hearings Procedure

The filing of an application for review of a notice of violation does not suspend the running of the period within which a petition for review of a proposed assessment of a civil penalty must be filed.

C & K Coal Co., 1 IBSMA 118 (Mar. 30, 1979) 86 I.D. 221

ENVIRONMENTAL HARM

In review proceedings of cessation orders issued pursuant to sec. 521(a)(2) of the Surface Mining Control and Reclamation Act of 1977, there must be a determination whether the condition, practice, or violation which is the basis for the order is one which creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

Claypool Construction Co., Inc., 1 IBSMA 259 (Sept. 26, 1979) 86 I.D. 486

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

INITIAL REGULATORY PROGRAM

Generally

The Secretary of the Interior has interpreted the Surface Mining Control and Reclamation Act of 1977 through his duly promulgated interim program regulations to exclude sec. 521(a)(1) of the Act from having effect during the interim regulatory program.

Dayton Mining Co., Inc., and Plateau, Inc., 1 IBSMA 125 (Apr. 17, 1979) 86 I.D. 241

The definition of "permittee" adopted by the Secretary for the initial regulatory program in 30 CFR 700.5 includes those persons who, through ignorance or dishonesty, fail to obtain a permit before engaging in activities regulated by a state.

Delight Coal Corp., 1 IBSMA 186 (June 5, 1979) 86 I.D. 321

When an interim regulatory provision is ambiguous when applied to a particular operation, and its intended meaning is not clarified by reference to the interim regulatory provisions as a whole and other pertinent interpretive materials, that provision may be construed in favor of the entity seeking relief from its application.

Western Engineering, Inc., 1 IBSMA 202 (June 22, 1979) 86 I.D. 336

"Permittee." The definition of "permittee" adopted by the Secretary for the initial regulatory program in 30 CFR 700.5 includes those persons who fail to obtain a State permit before conducting surface coal mining and reclamation operations regulated by a State.

Claypool Construction Co., Inc., 1 IBSMA 259 (Sept. 26, 1979) 86 I.D. 486

Performance Requirements

Applicability

The extraction of coal as an incidental part of privately financed construction is not an activity excluded, as such, from coverage by the performance requirements of the initial regulatory program.

James Moore, 1 IBSMA 216 (July 20, 1979) 86 I.D. 369

State Regulation

Compliance with State mining permit conditions does not excuse noncompliance with the initial Federal performance requirements.

Cedar Coal Co., 1 IBSMA 145 (Apr. 20, 1979) 86 I.D. 250

Regardless of whether a permittee has a mining and reclamation plan approved by the State regulatory authority before the interim regulations became effective, that plan must meet the requirements of the regulations.

Alabama By-Products Corp., 1 IBSMA 239 (Sept. 14, 1979) 86 I.D. 446

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 --Continued

INITIAL REGULATORY PROGRAM--Continued

State Regulation

The initial Federal regulatory program is not applicable to a surface coal mining operation which is located on State land and which is not subject to State regulation within the scope of any of the initial performance standards.

Dennis R. Patrick, 1 IBSMA 158 (Apr. 24, 1979) 86 I.D. 266

INSPECTIONS

In the absence of extraordinary circumstances, the Board is unwilling to consider an entry made without prior presentation of credentials by an inspector to be in compliance with the requirements of 30 CFR 721.12(a).

Consolidation Coal Co., 1 IBSMA 273 (Sept. 28, 1979) 86 I.D. 523

SPOIL AND MINE WASTES

Valley and Head-of-Hollow Fills

The fact that an operator may have begun constructing a fill which obstructed, interrupted, or encroached upon a natural drainage channel or natural stream channel prior to May 3, 1978, may not excuse the operator from complying with Federal requirements for a valley fill when he subsequently continues construction of the valley fill.

Dean Trucking Co., Inc., 1 IBSMA 229 (Sept. 11, 1979) 86 I.D. 437

STATE REGULATION

Regardless of whether a permittee has a mining and reclamation plan approved by the State regulatory authority before the interim regulations became effective, that plan must meet the requirements of the regulations.

In order for the regulatory authority's approval of a permittee's use of alternative materials in place of topsoil to be timely, it must be given before alternative material is substituted for topsoil.

Alabama By-Products Corp., 1 IBSMA 239 (Sept. 14, 1979) 86 I.D. 446

SURFACE OWNER CONSENT

The Secretary may, in computing the fair market value of coal to be leased competitively under privately owned surface, assume a limited surface owner consent cost, based on losses and costs to the surface estate and operation and similar evaluations, regardless of the actual price paid or the amount which a surface owner could otherwise demand for consent.

Assumption of a limited surface owner consent cost to be used in place of actual cost in the computation of fair market value of coal to be leased competitively is necessary to ensure receipt of fair market value by the public as required by 30 U.S.C. § 201(a) (1976).

In the exercise of his discretion to lease under the Mineral Leasing Act, the Secretary has authority to decline to issue a coal lease where surface owner consent costs prevent the public from realizing a fair return on the value of the coal.

Coal Leasing Program -- Relationship of the Cost of Surface Owner Consent to Receipt of Fair Market Value for Federally Owned Coal, M-36909 (Jan. 15, 1979) 86 I.D. 28

TOPSOIL

Alternative Materials

Even when the regulatory authority has approved the use of alternative materials in place of topsoil, the alternative materials must be handled in accordance with 30 CFR 715.16(a)(4)(iii).

In order for the regulatory authority's approval of a permittee's use of alternative materials in place of topsoil to be timely, it must be given before alternative material is substituted for topsoil.

Alabama By-Products Corp., 1 IBSMA 239 (Sept. 14, 1979) 86 I.D. 446

An operator must obtain approval from a State regulatory authority before using alternative materials instead of removing, segregating, and redistributing topsoil.

Carbon Fuel Co., 1 IBSMA 253 (Sept. 25, 1979) 86 I.D. 483

WATER QUALITY STANDARDS AND EFFLUENT LIMITATIONS

Discharges from Disturbed Areas

Discharges from any portion of a permitted area that is disturbed in the course of the permittee's mining operations must comply with the effluent limitations contained in 30 CFR 715.17(a) of the Department's initial regulatory program.

Thunderbird Coal Corp. v. Office of Surface Mining Reclamation and Enforcement, 1 IBSMA 85 (Jan. 18, 1979) 86 I.D. 38

Disturbed Areas

Sedimentation Ponds

A sedimentation pond is a "disturbed area," as that term is defined for the purpose of 30 CFR 715.17(a) of the Department's initial regulatory program, when any portion of the permitted area which drains into the sedimentation pond has been disturbed by the permittee other than by the construction of other sedimentation ponds, roads or diversion ditches.

Thunderbird Coal Corp. v. Office of Surface Mining Reclamation and Enforcement, 1 IBSMA 85 (Jan. 18, 1979) 86 I.D. 38

WORDS AND PHRASES

"Topsoil." For purposes of the topsoil removal requirements of 30 CFR 715.16(a), topsoil is either all the A horizon or the A horizon plus unconsolidated material

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 --Continued

WORDS AND PHRASES--Continued

to a depth of 6 inches or all unconsolidated material where less than 6 inches of material exists.

Carbon Fuel Co., 1 IBSMA 253 (Sept. 25, 1979) 86 I.D. 483

"Permittee." The definition of "permittee" adopted by the Secretary for the initial regulatory program in 30 CFR 700.5 includes those persons who fail to obtain a State permit before conducting surface coal mining and reclamation operations regulated by a State.

Claypool Construction Co., Inc., 1 IBSMA 259 (Sept. 26, 1979) 86 I.D. 486

SURVEYS OF PUBLIC LANDS

GENERALLY

The primary rule which the courts apply in construing and interpreting a conveyance where the location of the boundary lines is uncertain by reason of inconsistent or conflicting descriptive calls in the conveyance is that the intention of the parties controls and is to be followed. Where the calls for the location of boundaries to land are inconsistent, calls to monuments, natural or artificial, are of paramount importance and will prevail over all other calls inconsistent therewith. Calls to boundaries are of secondary importance, and courses and distances must be altered if, as given, they will not reach the designated boundary. Calls of course take precedence over distances, so that where it is necessary to either change direction to reach a boundary or else reduce or extend the prescribed distance, the distance must yield to the course. The recital of quantity or area of land conveyed or retained will be least influential.

United States v. Leroy S. Johnson et al., 39 IBLA 337 (Feb. 28, 1979)

An error in omitting to survey an island in a navigable stream does not divest the United States of title or interpose any obstacle to surveying it at a later time. An island within the public domain in a navigable stream and actually in existence both at the time of the survey of the banks of the stream and also upon the admission to the Union of the State within which it is situated remains the property of the United States. Even though omitted from survey, such land does not become part of the fractional subdivisions on the opposite banks of the stream.

Joseph Tomalino, August Sobotka, 42 IBLA 117 (Aug. 16, 1979)

DEPENDENT RESURVEYS

Where, at a hearing, a protestant does not meet his burden of establishing by clear and convincing evidence that a dependent resurvey is not an accurate retracement and reestablishment of the lines of the original survey, the decision dismissing his protest against the survey will be affirmed.

Frank Lujan, 40 IBLA 184 (Apr. 5, 1979)

TAYLOR GRAZING ACT

GENERALLY

A district manager's decision reached in the exercise of administrative discretion pursuant to the Taylor Grazing Act of 1934 may be regarded as arbitrary or capricious only where it is not supportable on any rational basis and the burden is on the appellant to show by substantial evidence that the decision is improper. A district manager's decision not to reissue a grazing lease for a certain area until that area is fenced and to reduce appellant's AUM's accordingly rests on a rational basis where the facts show that this unfenced area adjoins the bombing range and grazing thereon could result in trespass on the bombing range, inconsistent with the use of the range.

Colvin Cattle Co., Inc., 39 IBLA 176 (Jan. 30, 1979)

The Taylor Grazing Act created no reserved water rights.

The management programs mandated by Congress in such Acts as the Taylor Grazing Act and FLPMA require the appropriation of water by the United States in order to assure the success of the programs and carry out the objectives established by Congress.

FLPMA, the Taylor Grazing Act, the O&C Act, and other statutes permit the United States to appropriate water for the diverse purposes found in the various statutes.

Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914 (June 25, 1979) 86 I.D. 553

TIDELANDS

The Mineral Leasing Act for Acquired Lands does not exclude from oil and gas leasing those lands underlying the Missouri River within the boundaries of the Fort Berthold Indian Reservation as established by the Treaty of Fort Laramie (1851) and the Executive Order of Apr. 12, 1870, which were reacquired by the United States from the Indian tribes. The exclusion in the Act for submerged lands refers to submerged coastal lands, as set forth in 43 CFR 3101.2-1(g).

Impel Energy Corp., 42 IBLA 105 (Aug. 16, 1979)

TIMBER SALES AND DISPOSALS

The Federal Land Policy and Management Act of 1976, 43 U.S.C.A. § 1702(h) (West Supp. 1978), providing for sustained yield management of timber resources, and 16 U.S.C. §§ 594, 594-1 (1970), which direct a policy of preserving forest resources from insect infestation and damage, envisage that the Department is under an obligation to protect timber from such ravages, including without limitation, the sale of timber so affected.

A decision by a district office to proceed with a proposed timber sale, which was made after consideration of all relevant facts, and which decision is supported by the record, will not be disturbed in the absence of a showing that the decision is clearly in error.

Where a proposed Federal timber sale would allow the cutting of trees on a 162-acre tract pursuant to a properly promulgated decision of the Director of the Bureau of Land Management concerning the allowable cut in that district, such sale does not, by itself, constitute a major Federal action significantly affecting the quality of the human environment such as will

TIMBER SALES AND DISPOSALS--Continued

require the preparation of an environmental impact statement prior to the sale.

George Jalbert et al., 39 IBLA 205 (Feb. 2, 1979)

The right of appeal to the Board is limited to parties to a case adversely affected by a decision of BLM. A person protesting a timber sale does not become a party to a case until such time as BLM has issued a final decision adverse to his or her interests. The case is ordinarily ripe for appeal only when an adverse decision is made on the protest.

The receipt of timber sale bids by BLM pursuant to an advertised sale and subsequent to the filing of a protest of the sale, does not constitute an irrevocable commitment to complete the sale where all bidders acknowledge that the final decision to award the sale contract is contingent upon adjudication of the protest and the decision reached on any proper appeal therefrom. Hence, receipt of bids by BLM does not prejudice the rights of protestants to have their protest ruled upon and any proper appeal heard.

Elaine Mikels et al., 41 IBLA 305 (July 3, 1979)

TOWNSITES

R.S. 2387, 2388 and 2389, 43 U.S.C. §§ 718-720 (1976), were repealed by sec. 703 of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2790, and any transfer of land for a townsite within a National Forest after the effective date of FLPMA, Oct. 21, 1976, must be made under authority of sec. 213 of that Act. The filing of an application under other statutes prior to the enactment of FLPMA does not constitute a valid existing right which would survive FLPMA.

Townsite of Liberty, 40 IBLA 317 (Apr. 30, 1979)

Alaska Natives who occupied lots in a Native townsite on date of approval of final subdivisional townsite survey, prior to Oct. 21, 1976, are entitled to receive deeds thereto from the townsite trustee.

Leona R. Strang (Supp.), 43 IBLA 156 (Sept. 28, 1979)

TRESPASS

GENERALLY

Where there has been an unauthorized use of the public lands, BLM may assess damages against the trespasser and serve him with a demand for payment thereof, prior to turning the matter over to the Department of Justice for initiation of judicial proceedings. Where BLM assesses trespass damages based on the reasonable value, extent, and duration of an unauthorized use of the public lands, this assessment will not be disturbed unless the trespasser submits convincing evidence that it is incorrect.

Outdoor Adventure River Specialists, Inc., 41 IBLA 132 (June 14, 1979)

Past trespass, trespass damages, and trespass settlements may properly be considered in determining whether trespasses are repeated for the purpose of computing the damages to be assessed.

The Taylor Grazing Act, 43 U.S.C. §§ 315a-315r (1970), and other statutory authority empower the Secretary of the Interior to define what conduct constitues a grazing

TRESPASS--Continued

GENERALLY--Continued

trespass and whether or not an individual has committed a trespass.

Bureau of Land Management v. Harris Brothers, 42 IBLA 48 (July 31, 1979)

MEASURE OF DAMAGES

Where the evidence as to specific trespass indicates that of a number of cattle counted some were located on private intermingled land, but there were no barriers, either natural or artificial, which would have prevented the cattle on private land from going onto the public land, it is proper to find that all cattle counted would tend to consume forage at a rate proportional to the ratio of forage available on private and public lands.

Bureau of Land Management v. Holland Livestock Ranch et al., 39 IBLA 272 (Feb. 15, 1979) 86 I.D. 133

Where there has been an unauthorized use of the public lands, BLM may assess damages against the trespasser and serve him with a demand for payment thereof, prior to turning the matter over to the Department of Justice for initiation of judicial proceedings. Where BLM assesses trespass damages based on the reasonable value, extent, and duration of an unauthorized use of the public lands, this assessment will not be disturbed unless the trespasser submits convincing evidence that it is incorrect.

Outdoor Adventure River Specialists, Inc., 41 IBLA 132 (June 14, 1979)

Where the evidence shows that the commercial rate for forage ranged from $2.50 to $9.50 per AUM, an Administrative Law Judge's computation of damages, using $3.50 as the base figure, cannot be said to be unreasonable under 43 CFR 9239.3-2 (1976).

Bureau of Land Management v. Harris Brothers, 42 IBLA 48 (July 31, 1979)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970

GENERALLY

A hearing will not be held on a relocation assistance appeal where the facts are not in dispute and resolution of the appeal rests primarily upon an interpretation of law and where it does not appear that any additional evidence would be produced at a hearing to warrant any change in the decision from which the appeal is taken.

Uniform Relocation Assistance Appeal of Mrs. Blanche Schnuck, 3 OHA 65 (Apr. 10, 1979)

To the extent that any information given by Park Service representatives may have suggested to the claimants that relocation assistance benefits would be awarded them in the amount of $10,000, such advice was erroneous and cannot serve as a basis for creating any rights in the claimants which are not authorized by law.

Uniform Relocation Assistance Appeal of Charlie F. and Jimmy W. Sanders, 3 OHA 73 (May 24, 1979)

UNIFORM REAL PROPERTY ACQUISITION POLICY

Expenses Incidental to Transfer of Title to the United States

Where the record shows reimbursement was allowed by the National Park Service to the condemnees for the pro rata portion of real property taxes allocable to the period of the calendar year remaining after vesting of title to the lands in the United States, such condemnees having been obligated by court order to pay all of the real property taxes for the year concerned out of the condemnation award for the lands, the allowance being fair and reasonable for expenses necessarily incurred incidental to transfer of title to the real property to the United States will be affirmed.

Uniform Relocation Assistance Appeal of Mr. and Mrs. Timothy G. Lewis, 3 OHA 79 (June 27, 1979)

Uniform Relocation Assistance Appeal of Mr. and Mrs. Marvin E. Zeller, 3 OHA 82 (June 27, 1979)

A claim under sec. 303(3) of the Act for reimbursement of expenses for a pro rata portion of real property taxes allocable to the period of the calendar year remaining after vesting of title to the lands in the United States will be disallowed where such expenses are not shown to have been necessarily incurred by the condemnee(s) from whom the lands were acquired by the United States, condemnee(s) being obligated by court order to pay taxes on the lands for the portion of the year preceding the Government's acquisition of the property.

Uniform Relocation Assistance Appeal of Ms. Doris V. Brammer, 3 OHA 85 (July 5, 1979)

Uniform Relocation Assistance Appeal of Mr. and Mrs. Ervin P. Landis, 3 OHA 89 (July 5, 1979)

Uniform Relocation Assistance Appeal of Mr. and Mrs. Richard C. Scussel, 3 OHA 93 (July 13, 1979)

Where a deferred tax incurred because land was conveyed to the United States was not taken into account in the purchase price, that tax is a reimbursable expense under 42 U.S.C. § 4653(1) (1976).

Uniform Relocation Assistance Appeal of Boise Cascade Corp., 3 OHA 97 (July 31, 1979)

Penalty costs provided for in a land sales contract, assuring that the sellers (mortgagees) would receive the total amount in any premature payment of the indebtedness secured by the mortgage, are not prepayment penalty expenses reimbursable under § 303(2) of the Act as expenses incidental to transfer of title to the United States.

Uniform Relocation Assistance Appeal of Mr. and Mrs. Gerald L. Abercrombie, 3 OHA 104 (Aug. 9, 1979)

Where the record shows reimbursement was allowed by the National Park Service to the condemnee for the pro rata portion of real property taxes allocable to the period of the calendar year remaining after vesting of title to the lands in the United States, the allowance, being fair and reasonable for expenses necessarily incurred incidental to transfer of title to the real property to the United States, will be affirmed.

Uniform Relocation Assistance Appeal of Mr. Robert H. Hosick, 3 OHA 127 (Aug. 23, 1979)

UNIFORM RELOCATION ASSISTANCE

Generally

Tenants who had moved from real property acquired by the United States and were residing elsewhere at the time negotiations were initiated for the purchase of the property are not persons who moved from the acquired property as a result of its acquisition by the United States; and, therefore, they are not displaced persons entitled to relocation assistance benefits within the meaning of the law and implementing regulations.

Uniform Relocation Assistance Appeal of Mr. and Mrs. Scott McDonald, 3 OHA 39 (Feb. 1, 1979)

Moving and Related Expenses

Generally

Where the record shows expenses for electrician and plumber services were incurred as costs for adding facilities to the replacement dwelling rather than as costs for reestablishment and reconnection of facilities, they are not reimbursable as actual reasonable expenses incurred in relocating personal property under sec. 202(a) of the Act and the Department's implementing regulations.

Withdrawal, at the hearing, of a claim for cost of meals on the day of moving to the replacement dwelling will be accepted since the Act and the Department's implementing regulations do not provide for reimbursement of such expenses.

Reimbursement for time lost from work to supervise commercial movers is not allowable under the Act and Department's implementing regulations in the absence of evidence establishing the necessity for allowing a higher amount than that involved in the commercial move of the personal property concerned.

Uniform Relocation Assistance Appeal of Mr. and Mrs. John C. Muldowney, 3 OHA 47 (Mar. 16, 1979)

A person who entered into occupancy of real property after its ownership had passed to the United States is properly held to be ineligible for reimbursement of moving costs and related expenses under § 202 of the Act.

Uniform Relocation Assistance Appeal of Virginia Whitlock, 3 OHA 77 (June 18, 1979)

A displaced person is entitled to reimbursement for property lost in the process of moving only to the extent the loss did not occur through his own fault or neglect.

Uniform Relocation Assistance Appeal of James S. Johnson, 3 OHA 131 (Aug. 29, 1979)

Moving Expense Allowance

Generally

Allowances for moving expenses and for dislocation, under § 202(b) of the Act, are authorized only to persons whose occupancy on the acquired lands was lawful.

Uniform Relocation Assistance Appeal of Mr. Frank Wright, 3 OHA 121 (Aug. 14, 1979)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Moving and Related Expenses--Continued

Payments in Lieu of Moving and Related Expenses

Fixed Payment(s)

Taking of Business Operation

A claim for the minimum fixed payment provided under sec. 202(c) of the Act for displacement from a business, in lieu of actual reasonable moving and related expenses under sec. 202(a) of the Act, is properly denied where the record shows the business was essentially discontinued and not an on-going business operation during the 2 taxable years preceding the year in which the United States acquired the leasehold interest of the claimant in the real property on which the business had been conducted previously.

Uniform Relocation Assistance Appeal of Mr. Clair J. Bird, 3 OHA 69 (Apr. 20, 1979)

A claim for a fixed payment under § 202(c) of the Act for loss of a business on acquired lands, in lieu of moving and related expenses under § 202(a) of the Act, was properly determined on the basis of average annual net earnings as shown in the claimants' Federal income tax returns for the 2 years immediately preceding the year in which the lands were acquired.

Net income shown on Federal income tax returns, resulting from use of an accelerated method of depreciation for such purposes, cannot be established in a higher amount for purposes of a benefits claim under § 202(c) of the Act by separate book or straight line life depreciation accounting records of the claimant.

Net income shown on Federal income tax returns will not be changed for purposes of a benefits claim for displacement from a business where the evidence presented, with respect to personal expense deductions disallowed for 1973 by IRS audit, and assumed by the claimants to be disallowable for 1972, is lacking in probity and generally insufficient to establish any upwards revision of the net income shown on the tax returns as filed for those years.

Uniform Relocation Assistance Appeal of Mr. and Mrs. Gerald L. Abercrombie, 3 OHA 104 (Aug. 9, 1979)

Taking of Farm Operation

Although it was not legally incumbent upon the Park Service to use a consecutive 2-year period in calculating average annual net earnings under subsection 202(c) of the Act, claimants bear the burden of proving that it would have been more equitable in establishing such earnings to use some other period.

Uniform Relocation Assistance Appeal of Charlie F. and Jimmy W. Sanders, 3 OHA 73 (May 24, 1979)

Replacement Housing Payment for Homeowners

Generally

A claim for supplemental housing benefits may be withdrawn by the appellant pending the completion of the condemnation proceedings of the subject property.

Uniform Relocation Assistance Appeal of Roy Sagar, 3 OHA 35 (Jan. 15, 1979)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Replacement Housing Payment for Homeowners--Continued

Generally--Continued

A person who was not the record owner of the dwelling on property acquired by the United States is properly held to be ineligible for homeowner's replacement housing supplement benefits under sec. 203 of the Act and the Department's regulations.

Uniform Relocation Assistance Appeal of Mrs. James L. Bragg, 3 OHA 44 (Feb. 1, 1979)

In determining the total acquisition cost of the acquired dwelling, it is proper to add thereto the proportionate amount of the total acquisition costs for the entire property in excess of appraised valuation which is allocable to the acquisition cost of the acquired dwelling.

Where the dwelling is located on a large tract of acquired land, the acquisition cost of the dwelling properly includes the cost of a homesite for the dwelling which is of a size typical for the structure for residential purposes in the vicinity of the acquired property.

A determination of replacement housing differential benefits under the comparative method, based upon the average asking price of three selected dwellings which are shown to be comparable to the acquired dwelling and which were available at the time of the claimants' displacement, will be affirmed in the absence of competent evidence by the claimants to challenge such determination.

Where the record shows the usual charge for a residential site survey, such as required by a bank lending money on real estate, is $100, that amount may be allowed to the displaced homeowners as reasonable incidental expenses incurred in the purchase of the residential unit of the replacement property.

Where the acquiring agency shows at a hearing that an overpayment was made on a replacement housing differential claim, as a result of the agency's omission to include in the acquisition cost of the acquired dwelling and homesite the proportionate amount of a 9.24 percent increase in the total acquisition costs for the entire property allocable to the acquisition cost of the acquired residential unit, the displaced homeowners are required to repay to the United States the excess moneys received on their claim.

Uniform Relocation Assistance Appeal of Mr. and Mrs. John C. Muldowney, 3 OHA 47 (Mar. 16, 1979)

Waiver of Benefits

A person is properly held to be ineligible for replacement housing benefits where she sold real property to the Government, reserving a right of use and occupancy of the dwelling on the property for a term of years, and before the expiration of the reserved term of use and occupancy and her move from the property the Congress eliminated replacement housing benefits as to this class of claimants.

Uniform Relocation Assistance Appeal of Mrs. Blanche Schnuck, 3 OHA 65 (Apr. 10, 1979)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Replacement Housing Payment for Tenants and Certain Others

A person who entered into rental occupancy of a dwelling unit after negotiations were initiated by the United States to acquire the property is properly held to be ineligible for a replacement housing payment under sec. 204 of the Act.

Uniform Relocation Assistance Appeal of Mr. Marcel J. Dumonceaux, 3 OHA 63 (Apr. 9, 1979)

WAIVER

BLM does not waive its right to declare a lease expired by cashing an advance annual rental check and placing funds in an unearned account.

Richard P. Smoot, 39 IBLA 1 (Jan. 8, 1979)

The failure of BLM to readjust a coal lease issued pursuant to the terms of sec. 7, Mineral Leasing Act, 30 U.S.C. § 207 (1970), prior to or immediately after expiration of its 20-year period does not constitute a waiver of BLM's right to readjust said lease.

California Portland Cement Co., Rosebud Coal Sales Co., 40 IBLA 339 (May 10, 1979)

WATER AND WATER RIGHTS

GENERALLY

By acquisition of the lands now comprising the Western States, the United States acquired all rights appurtenant to such lands, including water rights.

Under the Property Clause, Congress has the power to control the disposition and use of water on, under, or appurtenant to original public domain lands, and it is not lightly inferred that this power has been exercised.

To the extent Congress has not clearly granted authority to the States over waters which are in, on, under or appurtenant to Federal lands comprising the public domain and reserved public domain, the Federal Government maintains its sovereign rights in such waters and may put them to use irrespective of State law.

Federal control over the disposition and use of water in, on, under or appurtenant to Federal land ultimately rests on the Supremacy Clause, which permits the Federal Government to exercise its constitutional prerogatives without regard to State law.

The admission of a State into the Union and the "equal footing" doctrine did not divest the United States of its plenary control over waters which are in, on, under or appurtenant to Federal lands comprising the public domain and reserved public domain.

Federal control over its needed water rights, unhampered by compliance with procedural and substantive State law, is supported by the Supremacy Clause and the doctrine that Federal activities are immune from State regulation unless there is specific congressional action providing for State control.

Originally, the common law riparian rules of natural flow applied to the public lands; these riparian rules could be changed by State legislatures only if such changes did not impair the right of the United States to the continued flow of water bordering its lands

WATER AND WATER RIGHTS--Continued

GENERALLY--Continued

needed for the beneficial use of Government property, or if the Congress expressly consented.

Three Federal statutes provide the general basis for State regulatory authority over water rights: Act of July 26, 1866, § 9, 14 Stat. 253; Act of July 9, 1870, § 17, 16 Stat. 218, 43 U.S.C. § 661 (1976); and the Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. § 321 et seq. (1976).

The Act of July 26, 1866, § 9, 14 Stat. 253, and the Act of July 9, 1870, § 17, 16 Stat. 218, 43 U.S.C. § 661 (1976), sanctioned private possessory rights to water on the public lands asserted under local laws and customs; Congress in effect waived its proprietary and riparian rights to water on the public domain to the extent water is appropriated by members of the public under State law in conformance with the grant of authority found in these two Acts, and Congress thereby confined the assertion of inchoate Federal water rights to unappropriated waters that exist at any point in time.

Supreme Court dicta concerning the effect of the Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. § 321 et seq. (1976), on Federal water rights are somewhat at war with each other; but Supreme Court decisions upholding Federal reserved water rights must mean that the Desert Land Act of 1877 did not divest the United States of its authority, as sovereign, to use the unappropriated waters on the public lands for governmental purposes.

Since the Federal Government has never granted away its right to make use of unappropriated waters on Federal lands, the United States retains the power to vest in itself water rights in unappropriated waters on, in, under, or appurtenant to Federal lands, and it may exercise such power independent of substantive State law.

For purposes of the Executive Order of Apr. 17, 1926, the term "spring" means a discrete natural flow of water emerging from the earth at a reasonably distinct location, whether or not such flow constitutes a source of or is tributary to a water course, pond, or other body of surface water. The term "waterhole" means a dip or hole in the earth's surface where surface or groundwater collects and which may serve as a watering place for man or animals.

The Executive Order withdrew, as of Apr. 17, 1926, all lands containing important springs and waterholes that existed as of that date on unappropriated, unreserved public lands.

The Executive Order does not affect a valid, private right to use some or all of the waters of such a source that vested under the applicable State laws, custom or usage prior to Apr. 17, 1926.

The Executive Order does not withdraw artifically developed sources of water or manmade structures for collection of water on the public domain. However, any interest held in those artificially developed or constructed sources or structures passes to the United States upon abandonment by the developer or his successor in interest by virtue of the United States' ownership of the land.

The Executive Order withdraws, by operation of law, lands which become of the character contemplated in the Order subsequent to the date of the Order; i.e., vacant, unappropriated, unreserved public lands upon which springs or waterholes come into existence after Apr. 17, 1926.

The Executive Order withdraws, by operation of law, any vacant, unappropriated, unreserved public land upon which is located a spring or waterhole and for which a private vested right to use all of such water under

WATER AND WATER RIGHTS--Continued

GENERALLY--Continued

applicable State law, custom and usage has previously existed upon abandonment or forfeiture of that State water right under the terms of the applicable State law, custom or usage.

The Executive Order withdraws all lands containing springs or waterholes as defined and subject to the limitations set forth above, regardless of whether the water source has been the subject of an official finding as to its existence and location.

The priority date for the public right to use the waters of a spring or waterhole withdrawn under the Order is Apr. 17, 1926, for all public springs and waterholes existing on that date. Those public springs and waterholes that naturally come into existence at a later date are withdrawn when they come into existence.

Any action taken by private party who did not have a vested State water right prior to Apr. 17, 1926, or had not received appropriate permission from the United States subsequent to that date to make use of the public waterhole or spring withdrawn by the Order is a nullity and of no force and effect. Any entry onto the reserved land for such purpose constitutes a trespass.

The purposes for which water is reserved under the 1926 Order are (a) stockwatering, (b) human consumption, (c) agriculture and irrigation, including sustaining fish, wildlife and plants as a food and forage source, and (d) flood, soil, fire and erosion control.

Because the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 et seq. (1976), repealed both authorizing statutes under which the Apr. 17, 1926, Order was issued, springs and waterholes on the public domain coming into existence after Oct. 21, 1976, are not withdrawn by the Apr. 17, 1926, Order but must be withdrawn under other, still existing legislative authority to be effective.

Sec. 701(g) of FLPMA, 43 U.S.C. § 1701 notes (1976), maintains the status quo in the relationship between the States and the Federal Government on water, and allows for (a) the continued appropriation of unappropriated nonnavigable waters on the public domain by private persons pursuant to State law as authorized by the Desert Land Act; (b) the right of the United States to use unappropriated water for the congressionally recognized and mandated purposes set forth in legislation providing for the management of the public domain; and (c) application by the United States to secure water rights pursuant to State law for these purposes.

The National Park Service and Fish and Wildlife Service may appropriate water to fulfill any congressionally authorized function for areas under their administration.

Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914 (June 25, 1979)
86 I.D. 553

Water is not a locatable mineral and sales thereof cannot be considered in determining whether there has been a valuable discovery.

United States v. Ted G. Ax, 43 IBLA 146 (Sept. 28, 1979)

FEDERAL APPROPRIATION

The United States has the right to appropriate water on its own property for congressionally authorized uses, which right arises from actual use of unappropriated water by the United States to carry out congressionally authorized management objectives on Federal lands, but may not predate in priority the date action is taken

WATER AND WATER RIGHTS--Continued

FEDERAL APPROPRIATION--Continued

leading to an actual use, and it may not adversely affect other rights previously established under State law.

The appropriation of water by the Federal Government for authorized Federal purposes cannot be strictly limited by State substantive law; for example, by what State law says is a "diversion" of water or a "beneficial use" for which water can be appropriated.

The management programs mandated by Congress in such Acts as the Taylor Grazing Act and FLPMA require the appropriation of water by the United States in order to assure the success of the programs and carry out the objectives established by Congress.

FLPMA, the Taylor Grazing Act, the O&C Act, and other statutes permit the United States to appropriate water for the diverse purposes found in the various statutes.

FLPMA authorizes the BLM to appropriate water for such uses as fish and wildlife maintenance and protection, scenic value preservation, and human consumption, and protection of areas of critical environmental concern.

Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914 (June 25, 1979)
86 I.D. 553

FEDERALLY RESERVED WATER RIGHTS

When the Federal Government withdraws land from the public domain and reserves it for a Federal purpose, by implication, it reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation, and the reserved water right vests on the date of the reservation and is superior to the rights of future appropriators.

The intent to reserve water is inferred if previously unappropriated water is necessary to accomplish the purposes for which the land reservation is created, but where water is only valuable for a secondary use of the reservation there arises a contrary inference that the United States would acquire water in the same manner as other public or private appropriators.

The priority date of the Federal reserved water right for purposes of determining seniority of water rights relative to those obtained under State or other Federal law is the date of the Federal reservation or withdrawal action initiated towards a reservation.

The volume and scope of particular reserved water rights are Federal questions calling for the application of Federal law; State law requirements such as notice of application to beneficial use and restrictions on beneficial use are not applicable to reserved water rights.

Reserved water rights encompass both existing and reasonably foreseeable future water uses necessary to fulfill the purposes of the reservation.

While persuasive arguments can be made for and against the application of reserved water rights on acquired lands, it is the policy of this Department to obtain water rights for acquired lands through means other than the assertion of a reserved water right.

The Act of June 16, 1934, 30 U.S.C. § 229a (1976), creates a reserved right when an oil and gas prospecting permittee or lessee strikes water "of such quality and quantity as to be valuable and usable at a reasonable cost for agriculture, domestic, or other purposes" as found by the Secretary.

FEDERALLY RESERVED WATER RIGHTS--Continued

The withdrawals of lands for powersites under 43 U.S.C. § 141 (1970) do not carry with them reserved water rights for purposes under the administration of the Department of the Interior, simply because of their reservation as a powersite.

Water sources located within stock driveways and reserved pursuant to sec. 10 of the Act of Dec. 29, 1916, 43 U.S.C. § 300 (1970), are reserved to the extent necessary to provide for stockwatering during the process of moving livestock through these reserved access corridors.

Oil shale withdrawals administered by the Department of the Interior have reserved water rights for the purposes of investigation, examination and classification of those lands. Water is not reserved for actual oil shale development.

The Taylor Grazing Act created no reserved water rights.

There are no reserved water rights on the revested Oregon and California Railroad lands and the Coos Bay Wagon Road lands, the "O&C" lands.

Classification of lands under the Classification and Multiple Use Act of 1964, 43 U.S.C. § 1411 et seq. (1970), does not create reserved water rights.

Designation of lands as sanctuaries for wild, free-roaming horses and burros under the Act of Dec. 15, 1971, 16 U.S.C. § 1333 et seq. (1976), does not reserve water for the purposes of wild horse and burro drinking.

Rivers administered by BLM that have been designated as components of the Wild and Scenic Rivers System under 16 U.S.C. §§ 1271-1287 (1976) carry with them reserved water rights sufficient to fulfill the purposes of the Act.

The Federal Land Policy and Management Act, 43 U.S.C. § 1701 et seq. (1976), does not establish any reserved rights in BLM lands.

Sec. 8 of the 1902 Reclamation Act, 43 U.S.C. § 372 et seq. (1976), prohibits the Bureau of Reclamation from claiming any reserved water rights for any reclamation project unless the terms of any project authorization subsequent to 1902 can fairly be read to provide for a reservation of water.

The particular reserved water rights for national park and national monument areas include water required for scenic, natural, and historic conservation uses; wildlife conservation uses; sustained public enjoyment uses; and National Park Service personnel uses; all of which are intimately related to the fundamental purpose for park and monument reservation, as articulated in 16 U.S.C. § 1 (1976).

Among other reserved water rights for national parks and national monuments, 16 U.S.C. § 1 (1976) encompasses reserved water rights for concession uses to provide sustained public enjoyment and reserved water rights for water-borne public enjoyment and recreation.

Congress has taken no action subsequent to the National Park Service Organic Act of Aug. 25, 1916, 39 Stat. 535, 16 U.S.C. § 1 (1976), to negate the implied intent contained in the Organic Act that all unappropriated waters necessary to fulfill the purposes of park areas are reserved as of the date of the enabling legislation.

The discretionary authority contained in the Act of Aug. 7, 1946, 60 Stat. 885, 16 U.S.C. § 17j-2(g) (1976), authorizing the National Park Service to acquire water rights in accordance with local laws, is not inconsistent with the assertion of the reserved

FEDERALLY RESERVED WATER RIGHTS--Continued

water rights principle and is readily distinguishable from Acts requiring deference to State water law.

As a general rule, the above-developed reserved water rights apply to components of the National Park System other than national parks and national monuments, though the extent of particular reserved water rights must be determined on a case-by-case basis, involving an interpretation of 16 U.S.C. § 1 (1976) and the establishing legislation.

Executive branch reservations for native bird preserves, migratory bird refuges, game ranges, fish hatcheries, elk refuges and similar refuges and preserves reserved sufficient water needed for the maintenance of the species (e.g., ecosystem food supply, breeding habitat, fire protection, domestic needs of Fish and Wildlife Service personnel) mentioned in the executive orders establishing the individual reservations.

Executive branch refuge reservations superimposed on areas previously withdrawn for powersites, reclamation or other purposes obtain reserved water rights necessary to fulfill the specific purposes for the refuge reservations.

Wildlife Refuge uses authorized by the Refuge Receipts Act of 1935, 49 Stat. 383, 16 U.S.C. § 715s(f) (1976); the Refuge Recreation Act of 1962, 76 Stat. 653, 16 U.S.C. §§ 460k-460k-4 (1976); and the National Wildlife Refuge Administration Act of 1966, 80 Stat. 927, 16 U.S.C. §§ 668dd-668ee (1976), such as public recreational uses, do not obtain reserved water rights under existing precedent.

The Wild and Scenic Rivers Act, 82 Stat. 917, 16 U.S.C. § 1284(c) (1976), contains an express, though negatively phrased, assertion of Federal reserved water rights. The extent of the water reserved for wild and scenic rivers is the amount of unappropriated water necessary to protect the particular aesthetic, recreational, scientific, biotic or historical features which led to the river's inclusion as a component of the National Wild and Scenic Rivers System, and to provide public enjoyment of such values.

Designation of wild and scenic rivers does not automatically reserve the entire unappropriated flow of the river and an examination of the individual features which led to each component river's designation must be conducted to determine the extent of the reserved water right.

Areas which are congressionally designated as wilderness under the Wilderness Act of Sept. 3, 1964, 78 Stat. 890, 16 U.S.C. § 1131 et seq. (1976), obtain reserved water rights for the maintenance of minimum stream flows and lake levels (e.g., for science appreciation and primitive water-borne recreation) and for ecological maintenance (e.g., evapotranspiration for natural communities, wildlife watering, firefighting).

Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914 (June 25, 1979)
86 I.D. 553

STATE LAWS

Since Congress has not generally directed the Federal Government to comply with State water law, such compliance is required only in those specific instances where Congress has so provided, but in the converse, Congress has not prohibited the United States from voluntarily complying with such State water laws.

State law should be followed to the greatest practicable extent in acquiring Federal water rights. This includes following State procedural law in all cases

WATER AND WATER RIGHTS--Continued

STATE LAWS--Continued

involving appropriation of non-reserved water rights and State substantive law where that law recognizes the Federal appropriative right in all pertinent respects.

Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914 (June 25, 1979) 86 I.D. 553

WATER POLLUTION CONTROL

FEDERAL WATER POLLUTION CONTROL ACT

Generally

The requirement for a permit under sec. 404 of the Federal Water Pollution Control Act applies to the Bureau of Reclamation to the same extent as any other person, and with certain exceptions the Bureau must obtain a permit from the Corps of Engineers prior to any discharge of dredged or fill material into the navigable waters.

Activities "affirmatively authorized by Congress," which are excepted from sec. 10 of the Rivers and Harbors Act of 1899, are not excepted from sec. 404 of the Federal Water Pollution Control Act. Notwithstanding the exception of a discharge of dredged or fill material under sec. 10 of the Rivers and Harbors Act, compliance with sec. 404 is required.

A permit under sec. 404 of the Federal Water Pollution Control Act is required for the discharge of dredged or fill material whenever: (a) the "discharge" constitutes any addition of any pollutant to navigatle waters from any discernible, confined and discrete conveyance, including the placement of fill and the building of any structure or impoundment; and (b) the "dredged material" is dredged spoil that is excavated or dredged from the waters of the United States; or (c) the "fill material" includes any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body, including any structure which requires rock, sand, dirt or other material for its construction; and (d) the discharge is made into "waters of the United States," which extend beyond those waters meeting the traditional tests of navigability to those encompassed by the broadest possible constitutional interpretation.

To secure the exemption under sec. 404(r) of the Federal Water Pollution Control Act for projects described in an environmental statement, compliance with seven specific conditions is required. The exemption does nct apply to the maintenance of existing Federal projects, but only to new construction. While the exemption provides an alternative procedure to achieve compliance with sec. 404 of the Act for a limited category of Federal projects under very specific conditions, it does not lessen the substantive requirements that apply to the discharge of dredged or fill material.

To secure the exemption under sec. 404(f)(1) of the Federal Water Pollution Control Act for the maintenance of currently serviceable structures, compliance with four specific conditions is required. The exemption does nct apply to the discharge of dredged material incident to maintenance dredging, or to new construction.

Permit Requirements for Discharge of Dredged or Fill Material Under Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. § 1344, M-36915 (Aug. 27, 1979) 86 I.D. 400

WILD AND SCENIC RIVERS ACT

Designation of a river for potential addition to the national wild and scenic rivers system, pursuant to the Wild and Scenic Rivers Act of 1968, as amended, 16 U.S.C. § 1271 et seq. (1976), withdraws Federal lands constituting the bed or bank or within one-quarter mile of the bank of such river from all forms of appropriation under the mining laws, and on appeal the mining claimant bears the burden of showing by survey or other evidence that his claim is outside the withdrawn area.

Barry C. Binning, 39 IBLA 390 (Feb. 28, 1979)

Rivers administered by BLM that have been designated as components of the Wild and Scenic Rivers System under 16 U.S.C. §§ 1271-1287 (1976) carry with them reserved water rights sufficient to fulfill the purposes of the Act.

The Wild and Scenic Rivers Act, 82 Stat. 917, 16 U.S.C. § 1284(c) (1976), contains an express, though negatively phrased, assertion of Federal reserved water rights.

The extent of the water reserved for wild and scenic rivers is the amount of unappropriated water necessary to protect the particular aesthetic, recreational, scientific, biotic or historical features which led to the river's inclusion as a component of the National Wild and Scenic Rivers System, and to provide public enjoyment of such values.

Designation of wild and scenic rivers does not automatically reserve the entire unappropriated flow of the river and an examination of the individual features which led to each component river's designation must be conducted to determine the extent of the reserved water right.

Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914 (June 25, 1979) 86 I.D. 553

WILD FREE-ROAMING HORSES AND BURROS ACT

A district office decision denying an amended claim for ownership of horses under sec. 5 of the Wild Free-Roaming Horses and Burros Act of Dec. 15, 1971, 16 U.S.C. § 1335 (1976), will be reversed where appellant shows that due to the vastness and nature of the terrain involved the original claim was only an estimate of the number of horses within the allotment, that the additional horses claimed are progeny of the original horses gathered as authorized by BLM, that the allotment on which these horses are located is fenced, that appellant applied to amend its claim, and that appellant has never conceded ownership of these horses.

Salmon River Cattlemen's Association, Inc., 39 IBLA 381 (Feb. 28, 1979)

Designation of lands as sanctuaries for wild, free-roaming horses and burros under the Act of Dec. 15, 1971, 16 U.S.C. § 1333 et seq. (1976), does not reserve water for the purposes of wild horse and burro drinking.

Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914 (June 25, 1979) 86 I.D. 553

WILDERNESS ACT

Areas which are congressionally designated as wilderness under the Wilderness Act of Sept. 3, 1964, 78 Stat. 890, 16 U.S.C. § 1131 et seq. (1976), obtain reserved water rights for the maintenance of minimum stream flows and lake levels (e.g., for science appreciation and primitive water-borne recreation) and for ecological maintenance (e.g., evapotranspiration for natural communities, wildlife watering, firefighting).

Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914 (June 25, 1979)
86 I.D. 553

WILDLIFE REFUGES AND PROJECTS

GENERALLY

The National Park Service and Fish and Wildlife Service may appropriate water to fulfill any congressionally authorized function for areas under their administration.

Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914 (June 25, 1979)
86 I.D. 553

Land within the National Desert Wildlife Range is not subject to noncompetitive oil and gas leasing.

Kenneth F. Cummings, 43 IBLA 110 (Sept. 24, 1979)

RIPARIAN RIGHTS

Executive branch reservations for native bird preserves, migratory bird refuges, game ranges, fish hatcheries, elk refuges and similar refuges and preserves reserved sufficient water needed for the maintenance of the species (e.g., ecosystem food supply, breeding habitat, fire protection, domestic needs of Fish and Wildlife Service personnel) mentioned in the executive orders establishing the individual reservations.

Executive branch refuge reservations superimposed on areas previously withdrawn for powersites, reclamation or other purposes obtain reserved water rights necessary to fulfill the specific purposes for the refuge reservations.

Wildlife Refuge uses authorized by the Refuge Receipts Act of 1935, 49 Stat. 383, 16 U.S.C. § 715s(f) (1976); the Refuge Recreation Act of 1962, 76 Stat. 653, 16 U.S.C. §§ 460k-460k-4 (1976); and the National Wildlife Refuge Administration Act of 1966, 80 Stat. 927, 16 U.S.C. §§ 668dd-668ee (1976), such as public recreational uses, do not obtain reserved water rights under existing precedent.

Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914 (June 25, 1979)
86 I.D. 553

WITHDRAWALS AND RESERVATIONS

GENERALLY

Without adequate proof of a tender of a notice of location or application to purchase a headquarters site which was wrongfully denied by Bureau of Land Management personnel prior to a withdrawal of the land, the mere occupancy of land prior to the withdrawal did not create a "valid existing right" excepted from the effect of the withdrawal, and an application to purchase a headquarters site filed after the withdrawal is properly rejected.

Rene P. Lamoureux d/b/a Frenchy Lamoureux, 39 IBLA 36 (Jan. 15, 1979)

Oil and gas offers, filed for lands withdrawn by PLO No. 5418, must be rejected. The order was issued under the authority of the Pickett Act, 43 U.S.C. §§ 141-142 (1970), repealed by FLPMA, and the order was not arbitrary, capricious, or an abuse of discretion.

Whether the issuance of PLO No. 5448, prohibiting oil and gas leasing in Alaska, without prior proposed rulemaking is violative of the Administrative Procedure Act or of the Alaska Native Claims Settlement Act need not be decided; by such issuance the Secretary has enunciated a policy of rejecting mineral lease applications well within his discretionary authority.

Bristol Bay Native Corp., 41 IBLA 85 (June 4, 1979)

A Native allotment applicant, who was 5 years old at the time when the land was withdrawn from all forms of appropriation, is properly deemed to be incapable as a matter of law of having exerted independent use and occupancy of the land to the exclusion of others prior to the withdrawal and consequently the allotment application is properly rejected.

Floyd L. Anderson, Sr., 41 IBLA 280 (June 28, 1979)
86 I.D. 345

Peter Panruk, 43 IBLA 69 (Sept. 19, 1979)

The Board adopts the Solicitor's conclusion that Public Land Order No. 82 (Jan. 22, 1943) (8 FR 1599 (Feb. 4, 1943)) constituted an express retention for the United States of submerged lands when Alaska was admitted to the Union, and title to the submerged lands withdrawn by PLO No. 82 did not pass to the State of Alaska with statehood.

Appeal of State of Alaska, 3 ANCAB 297 (July 31, 1979)
86 I.D. 381

Where the land on which the mining claim is located is subsequently withdrawn, the validity of the claim must be determined as of the date of the withdrawal and through the date of the hearing. If there was no discovery as of the date of the withdrawal, the land would not be excepted from the effect of the withdrawal and the claim could not thereafter become valid even though the requirement of discovery was satisfied at a later date.

United States v. William Lavon Chappell et al., 42 IBLA 74 (Aug. 13, 1979)

WITHDRAWALS AND RESERVATIONS--Continued

GENERALLY--Continued

Withdrawn lands are not open to appropriation under the Native Allotment Act. Appellant's settlement upon a tract of land withdrawn from entry is a trespass, and such settlement does not provide a basis for any claim to the land.

Publication in the Federal Register of PLO No. 3432 withdrawing certain lands in Alaska from all forms of appropriation under the public land laws, except leasing under the mineral leasing laws, gives valid notice of its contents.

Elizabeth J. Martini, 42 IBLA 82 (Aug. 13, 1979)

An allotment right is personal to one who has fully complied with the law and regulations and an applicant for a Native allotment may not tack on ancestral use and occupancy of the land to establish his right thereto. Ancestral use of the land while open to settlement does not create any right that excepts the land from a withdrawal in favor of an applicant who may have initiated use and occupancy subsequent to the withdrawal.

Sam Hanlon, Sr., 42 IBLA 161 (Aug. 17, 1979)

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of a State's application to select lands segregates these lands from all subsequent appropriation, including locations under the mining laws.

Joe D. Denson, 43 IBLA 136 (Sept. 28, 1979)

A recreation and public purposes classification, issued pursuant to the Recreation Act of 1926, as amended, 43 U.S.C. § 869 (1976), segregates Alaskan lands from Native allotment applications until such time as the classification is revoked.

PLO No. 4582, as amended, withdraws the land included therein and bars a subsequent Native allotment application.

Under Secretarial Order No. 3040, it is sufficient if the 5 years' use and occupancy, required under the Native Allotment Act, is completed prior to the granting of the allotment, providing applicant either filed for his allotment or commenced use and occupancy prior to the withdrawal.

Betty J. Thompson, 43 IBLA 174 (Sept. 28, 1979)

AUTHORITY TO MAKE

Whether the issuance of PLO No. 5448, prohibiting oil and gas leasing in Alaska, without prior proposed rulemaking is violative of the Administrative Procedure Act or of the Alaska Native Claims Settlement Act need not be decided; by such issuance the Secretary has enunciated a policy of rejecting mineral lease applications well within his discretionary authority.

Bristol Bay Native Corp., 41 IBLA 85 (June 4, 1979)

EFFECT OF

Public Land Order 82, issued in 1943, which withdrew from "sale, location, selection, and entry" certain described "public lands" in the Territory of Alaska, could include coastal and inland submerged lands, if such were the intent of the Order.

Where the language of a withdrawal order is unclear as to whether submerged lands were included in the order

WITHDRAWALS AND RESERVATIONS--Continued

EFFECT OF--Continued

which withdrew certain lands in the Territory of Alaska from "sale, location, or entry," the withdrawal should be construed to carry out its intent and purpose.

Where the description in the withdrawal order affecting lands in the Territory of Alaska is ambiguous, but can be interpreted to exclude coastal submerged lands, and where other evidence exists which tends to indicate that coastal submerged lands were not intended to be included in the order, the order will be construed to exclude coastal submerged lands.

Where evidence exists that a withdrawal of certain lands in the Territory of Alaska intended to include inland submerged lands, and such submerged lands are not specifically excepted from the withdrawal, the withdrawal will be construed to include inland submerged lands.

Where submerged lands were included in a withdrawal order in Alaska, which was in effect at the time the State entered the Union, even though such submerged lands were not specifically described in the withdrawal order, such submerged lands would not pass to the State at statehood pursuant to sec. 5(a) of the Submerged Lands Act.

The subsequent revocation of a withdrawal of submerged lands which prevented the State from acquiring title to such lands at statehood pursuant to sec. 5(a) of the Submerged Lands Act, has no effect on the ownership of the lands contained in the withdrawal.

Where the coastal submerged lands in the Arctic National Wildlife Refuge were segregated by an application for a withdrawal filed by the Fish and Wildlife Service in Jan. 1958, 1 year before Alaska statehood, such application operated as an express retention of the lands at statehood under the Submerged Lands Act, and prevented passage of title of the coastal submerged lands to the State.

The Effect of Public Land Order 82 on the Ownership of Coastal Submerged Lands in Northern Alaska, M-36911 (Dec. 12, 1978) 86 I.D. 151 (1979)

A mining claim located on land which has been previously withdrawn from location under the mining laws may be properly declared null and void ab initio without a hearing. Such a claim confers no rights on the locator or a subsequent grantee and will not be validated by the modification or revocation of the order of withdrawal to open the land thereafter to mineral entry. It is immaterial whether the lands are presently being, or have ever been, used for the purpose for which they were withdrawn.

Wendell L. Garrett d.b.a. Garrett Industries, 39 IBLA 85 (Jan. 24, 1979)

Lands which are withdrawn from entry remain withdrawn and are not open under the public land laws until there is formal revocation or modification of order of withdrawal and a restoration order opening the lands. Mere passage of time or accomplishment of avowed purpose cannot serve as substitute for formal revocation and restoration.

Erroneous issuance by BLM of oil and gas lease on other withdrawn land in area of tract for which appellant submitted lease offer does not effect restoration to leasing of latter withdrawn tract.

F. M. Tully, 39 IBLA 137 (Jan. 29, 1979)

WITHDRAWALS AND RESERVATIONS--Continued

EFFECT OF--Continued

Portions of mining claims located on lands within a withdrawal and not open to mineral entry are properly declared null and void ab initio.

Barry C. Binning, 39 IBLA 390 (Feb. 28, 1979)

Lands segregated on the public records by a proposed withdrawal posted Apr. 6, 1973, or a Recreational and Public Purposes Classification filed Nov. 13, 1956, were not available for the location of mining claims, and claims thereafter located are null and void ab initio.

Neither a Recreation and Public Purposes Act classification nor a withdrawal is a rule or regulation within the ambit of the Secretarial policy of Apr. 27, 1971, which provides for utilization of the public participation procedures of 5 U.S.C. § 553 (1976).

Mining claims purportedly located on land not available for such location confer no property right upon the locator, and may be declared null and void ab initio without a hearing under 5 U.S.C. § 554 et seq. (1976).

The notation on public records on Apr. 6, 1973, of an application for withdrawal, even though the application did not contain a reference to authority for the withdrawal, as required in 43 CFR 2351.2(b) (1972), was sufficient to temporarily segregate the land under secs. 2091.2-5 (1972) and 2351.3 (1972) from subsequent inclusion in a mining location.

Delmer McLean et al., 40 IBLA 34 (Mar. 15, 1979)

A mining claim located on land previously withdrawn from appropriation under the mining laws is null and void ab initio.

Gerald Byron Bannon, 40 IBLA 162 (Mar. 30, 1979)

Tilden Holloway, Roland Wright, 43 IBLA 134 (Sept. 28, 1979)

Oil and gas offers, filed for lands withdrawn by PLO No. 5418, must be rejected. The order was issued under the authority of the Pickett Act, 43 U.S.C. §§ 141-142 (1970), repealed by FLPMA, and the order was not arbitrary, capricious, or an abuse of discretion.

Bristol Bay Native Corp., 41 IBLA 85 (June 4, 1979)

A Native allotment applicant, who was 5 years old at the time when the land was withdrawn from all forms of appropriation, is properly deemed to be incapable as a matter of law of having exerted independent use and occupancy of the land to the exclusion of others prior to the withdrawal and consequently the allotment application is properly rejected.

Floyd L. Anderson, Sr., 41 IBLA 280 (June 28, 1979)
86 I.D. 345

Peter Panruk, 43 IBLA 69 (Sept. 19, 1979)

A grazing lease issued under the Alaska Grazing Act, 43 U.S.C. § 316 et seq. (1970), appropriates the lands and segregates them from the public domain, barring

WITHDRAWALS AND RESERVATIONS--Continued

EFFECT OF--Continued

them from use and occupancy for Native allotment purposes until the Department takes action to exclude lands from the lease.

Herman Anderson, Jr., Nicholas Pestrikoff, Anthony Drabek, 41 IBLA 296 (June 29, 1979)

Where the land on which the mining claim is located is subsequently withdrawn, the validity of the claim must be determined as of the date of the withdrawal and through the date of the hearing. If there was no discovery as of the date of the withdrawal, the land would not be excepted from the effect of the withdrawal and the claim could not thereafter become valid even though the requirement of discovery was satisfied at a later date.

United States v. William Lavon Chappell et al., 42 IBLA 74 (Aug. 13, 1979)

Where a trade and manufacturing site is located on land that is withdrawn from appropriation prior to its occupancy and use, an application to purchase is properly denied despite the fact that applicant entered the land as a special use permittee.

Mardelle M. Smith, Sherman C. Smith, 42 IBLA 136 (Aug. 16, 1979)

A mining claim located on land which was then segregated and closed to mineral entry is properly declared null and void ab initio.

Joe D. Denson, 43 IBLA 136 (Sept. 28, 1979)

A recreation and public purposes classification, issued pursuant to the Recreation Act of 1926, as amended, 43 U.S.C. § 869 (1976), segregates Alaskan lands from Native allotment applications until such time as the classification is revoked.

PLO No. 4582, as amended, withdraws the land included therein and bars a subsequent Native allotment application.

Under Secretarial Order No. 3040, it is sufficient if the 5 years' use and occupancy, required under the Native Allotment Act, is completed prior to the granting of the allotment, providing applicant either filed for his allotment or commenced use and occupancy prior to the withdrawal.

Betty J. Thompson, 43 IBLA 174 (Sept. 28, 1979)

POWERSITES

Where a mining claim has been located pursuant to the Mining Claims Rights Restoration Act, 30 U.S.C. §§ 621-625 (1970), on land withdrawn for powersite, it is proper to prohibit placer mining if there is a likelihood of substantial interference with the use of the land for fishing, hunting, recreation, and the recovery of archaeological values.

The Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a (1970), does not require the granting of permission for placer mining operations on land within a

WITHDRAWALS AND RESERVATIONS--Continued

POWERSITES--Continued

powersite withdrawal where such operations would probably interfere with other uses of the land.

United States v. Edward J. Connolly, Jr., Idaho Fish and Game Department (Intervenor), 40 IBLA 30 (Mar. 15, 1979)

The withdrawals of lands for powersites under 43 U.S.C. § 141 (1970) do not carry with them reserved water rights for purposes under the administration of the Department of the Interior, simply because of their reservation as a powersite.

Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914 (June 25, 1979)
86 I.D. 553

Where an applicant for a Native allotment alleges use and occupancy of lands which had previously been withdrawn in accordance with sec. 24, Federal Water Power Act of June 10, 1920, an application is properly denied despite the fact that a public land order designating the area a powersite classification is issued subsequent to the applicant's commencement of use and occupancy. Lands included in an application for powersite development under the Act shall from the date of filing of the application be reserved from entry, location, or other disposal under the laws of the United States, unless otherwise directed by the Federal Power Commission or by Congress.

Lindberg Alexander, 41 IBLA 382 (July 23, 1979)

Lands included in an application for powersite development under the Federal Power Act of June 10, 1920, 16 U.S.C. § 818 (1976), shall from the date of filing of the application be reserved from entry, location, or other disposal under the laws of the United States, unless otherwise directed by the Federal Power Commission or by Congress.

Charles L. John, 42 IBLA 260 (Aug. 27, 1979)

REVOCATION AND RESTORATION

A mining claim located on land which has been previously withdrawn from location under the mining laws may be properly declared null and void ab initio without a hearing. Such a claim confers no rights on the locator or a subsequent grantee and will not be validated by the modification or revocation of the order of withdrawal to open the land thereafter to mineral entry. It is immaterial whether the lands are presently being, or have ever been, used for the purpose for which they were withdrawn.

Wendell L. Garrett d.b.a. Garrett Industries, 39 IBLA 85 (Jan. 24, 1979)

Lands which are withdrawn from entry remain withdrawn and are not open under the public land laws until there is formal revocation or modification of order of withdrawal and a restoration order opening the lands. Mere passage of time or accomplishment of avowed purpose cannot serve as substitute for formal revocation and restoration.

Erroneous issuance by BLM of oil and gas lease on other withdrawn land in area of tract for which appellant

WITHDRAWALS AND RESERVATIONS--Continued

REVOCATION AND RESTORATION--Continued

submitted lease offer does not effect restoration to leasing of latter withdrawn tract.

F. M. Tully, 39 IBLA 137 (Jan. 29, 1979)

SPRINGS AND WATERHOLES

Generally

For purposes of the Executive Order of Apr. 17, 1926, the term "spring" means a discrete natural flow of water emerging from the earth at a reasonably distinct location, whether or not such flow constitutes a source of or is tributary to a water course, pond, or other body of surface water. The term "waterhole" means a dip or hole in the earth's surface where surface or groundwater collects and which may serve as a watering place for man or animals.

The Executive Order withdrew, as of Apr. 17, 1926, all lands containing important springs and waterholes that existed as of that date on unappropriated, unreserved public lands.

The Executive Order does not withdraw artifically developed sources of water or manmade structures for collection of water on the public domain. However, any interest held in those artificially developed or constructed sources or structures passes to the United States upon abandonment by the developer or his successor in interest by virtue of the United States' ownership of the land.

The Executive Order withdraws, by operation of law, lands which become of the character contemplated in the Order subsequent to the date of the Order; i.e., vacant, unappropriated, unreserved public lands upon which springs or waterholes come into existence after Apr. 17, 1926.

The Executive Order withdraws all lands containing springs or waterholes as defined and subject to the limitations set forth above, regardless of whether the water source has been the subject of an official finding as to its existence and location.

The priority date for the public right to use the waters of a spring or waterhole withdrawn under the Order is Apr. 17, 1926, for all public springs and waterholes existing on that date. Those public springs and waterholes that naturally come into existence at a later date are withdrawn when they come into existence.

The purposes for which water is reserved under the 1926 Order are (a) stockwatering, (b) human consumption, (c) agriculture and irrigation, including sustaining fish, wildlife and plants as a food and forage source, and (d) flood, soil, fire and erosion control.

Because the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 et seq. (1976), repealed both authorizing statutes under which the Apr. 17, 1926, Order was issued, springs and waterholes on the public domain coming into existence after Oct. 21, 1976, are not withdrawn by the Apr. 17, 1926, Order but must be withdrawn under other, still existing legislative authority to be effective.

Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914 (June 25, 1979)
86 I.D. 553

WITHDRAWALS AND RESERVATIONS--Continued

SPRINGS AND WATERHOLES--Continued

Rights-of-Way

Any action taken by private party who did not have a vested State water right prior to Apr. 17, 1926, or had not received appropriate permission from the United States subsequent to that date to make use of the public waterhole or spring withdrawn by the Order is a nullity and of no force and effect. Any entry onto the reserved land for such purpose constitutes a trespass.

Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914 (June 25, 1979)
86 I.D. 553

State Laws

The Executive Order does not affect a valid, private right to use some or all of the waters of such a source that vested under the applicable State laws, custom or usage prior to Apr. 17, 1926.

The Executive Order withdraws, by operation of law, any vacant, unappropriated, unreserved public land upon which is located a spring or waterhole and for which a private vested right to use all of such water under applicable State law, custom and usage has previously existed upon abandonment or forfeiture of that State water right under the terms of the applicable State law, custom or usage.

Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914 (June 25, 1979)
86 I.D. 553

STOCK-DRIVEWAY WITHDRAWALS

Water sources located within stock driveways and reserved pursuant to sec. 10 of the Act of Dec. 29, 1916, 43 U.S.C. § 300 (1970), are reserved to the extent necessary to provide for stockwatering during the process of moving livestock through these reserved access corridors.

Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914 (June 25, 1979)
86 I.D. 553

TEMPORARY WITHDRAWALS

Lands segregated on the public records by a proposed withdrawal posted Apr. 6, 1973, or a Recreational and Public Purposes Classification filed Nov. 13, 1956, were not available for the location of mining claims, and claims thereafter located are null and void ab initio.

Neither a Recreation and Public Purposes Act classification nor a withdrawal is a rule or regulation within the ambit of the Secretarial policy of Apr. 27, 1971, which provides for utilization of the public participation procedures of 5 U.S.C. § 553 (1976).

Mining claims purportedly located on land not available for such location confer no property right upon the locator, and may be declared null and void ab initio without a hearing under 5 U.S.C. § 554 et seq. (1976).

The notation on public records on Apr. 6, 1973, of an application for withdrawal, even though the application did not contain a reference to authority for the withdrawal, as required in 43 CFR 2351.2(b) (1972), was sufficient to temporarily segregate the land under

TEMPORARY WITHDRAWALS--Continued

secs. 2091.2-5 (1972) and 2351.3 (1972) from subsequent inclusion in a mining location.

Delmer McLean et al., 40 IBLA 34 (Mar. 15, 1979)

WORDS AND PHRASES

"Lode" and "placer." A placer mining claim has been defined as ground within defined boundaries which contain mineral in its earth, sand, or gravel; ground that includes valuable deposits not in place, that is, not fixed in rock, but which are in a loose state, and may in most cases be collected by washing or amalgamation without milling. Whereas, a lode or vein has been defined as any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock; a body of mineral or mineral bearing rock within defined boundaries.

When mining claims have been located as placer claims for perlite which lies in a "blanket" or "pancake" in an almost horizontal plane and in its original state is encased between two different types of rock, where in places, the upper rock or layer has been eroded away leaving the perlite exposed at the surface and in other places on the claims the upper layer is still present, and the mining of the perlite is characterized as essentially a hard rock operation, and when it is first extracted from the ground and then processed or, in effect, milled to produce a marketable product, the perlite is properly classified as a lode deposit which will not sustain a placer location.

United States v. Estate of Arthur C. W. Bowen (Deceased), and Superior Perlite Mines, Inc. (Contestees), Harborlite Corp. (Intervenor), 38 IBLA 390 (Jan. 8, 1979)

"Interest." Where an oil and gas leasing service selects lands, files offers, and advances funds on behalf of its clients for leases which the service is willing to sell on behalf of any successful client, strictly at the client's option, in return for a percentage commission on the sale, the service has no enforceable right to any portion of the lease, if issued. In such circumstances, the service does not have an "interest" in the lease, so that the client/offeror is not precluded from stating that he is the sole party in interest to the offer, and the filing of offers for the same parcel by other clients of the service is not disqualifying.

Geosearch, Inc., 39 IBLA 49 (Jan. 16, 1979)

Geosearch, Inc., 40 IBLA 267 (Apr. 18, 1979)

Geosearch, Inc., 40 IBLA 401 (May 14, 1979)

"Fair market value." As used in 43 CFR 2802.1-7, "fair market value" of a communication site right-of-way is the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the right to use the site would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user who desired but is not obligated to so use.

Donald R. Clark, C. Reinhart & Son, Inc., Hartwell Excavating Co., 39 IBLA 182 (Jan. 31, 1979)

WORDS AND PHRASES--Continued

"Lands not available for leasing." Under 43 CFR 3110.1-3(a), lands are deemed to be not available for leasing when they are surrounded by lands contained within patents with no oil and gas rights reserved to the United States, when they are segregated from oil and gas leasing by withdrawal, or are embraced within an outstanding lease with an effective issuance date prior to the filing date of the subject offer.

Helen E. Reid, 39 IBLA 378 (Feb. 28, 1979)

"Known geologic structure." A known geologic structure is technically the trap in which an accumulation of oil or gas has been discovered by drilling and determined to be productive, the limits of which include all acreage that is presumptively productive.

Jack J. Bender, 40 IBLA 26 (Mar. 9, 1979)

"Contest." A decision declaring claims located on withdrawn lands to be null and void ab initio is not a "contest" and regulations under 43 CFR 4.451 et seq., relating to mining contests, have no application.

Delmer McLean et al., 40 IBLA 34 (Mar. 15, 1979)

"A well capable of producing oil or gas in paying quantities." The provision in 30 U.S.C. § 226(f) (1976) referring to a well capable of producing oil or gas in paying quantities refers to a well which is actually in physical condition to produce a sufficient quantity of oil or gas to yield a reasonable profit over and above the costs of operating the well and marketing the product. A satisfactory test of a well to establish its capability as of the termination date is necessary. Evidence which only supports inferences is not sufficient, nor is a showing only of a potential prospect for profitable operation at some future time.

American Resources Management Corp., 40 IBLA 195 (Apr. 5, 1979)

"Interest." Where there is an agreement giving an offeror the option of selling part of an oil and gas lease to his agent leasing service, exercisable solely at the offeror's discretion, the agent has a mere hope or expectancy and not an "interest" in the offer, as defined in 43 CFR 3100.0-5(b). A leasing service, which files a simultaneous noncompetitive oil and gas lease offer drawing entry card on behalf of its client,

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bound by a "put option" does not have a hidden interest in the offer and does not violate 43 CFR 3102.7 by failing to disclose this put option or 43 CFR 3112.5-2 by filing offers for more than one client on a parcel.

Jack Mask, 41 IBLA 147 (June 18, 1979)

Kelley Everette, 41 IBLA 155 (June 18, 1979)

"Person." A State is a "person" within the meaning of the Department's private contest regulations.

State of Alaska et al., 41 IBLA 315 (July 11, 1979)
86 I.D. 361

"Paying Quantities." The term "paying quantities," used in the Brady (Deep) Unit Agreement to determine whether or not a participating area of a unit should include additional tracts where the existence of hydrocarbons in paying quantities is disputed, refers to cost of drilling and production plus a reasonable profit.

Amoco Production Co., 41 IBLA 348 (July 11, 1979)

"Person." Regulation 43 CFR 4.450-1 specifically gives persons with an adverse interest in land a right to contest the adverse claim. It does not depend on the applicability of the due process clause of the Constitution to either claimant. A State is a "person" within the meaning of this private contest regulation.

State of Alaska, 42 IBLA 1 (July 25, 1979)

"Public Lands." Land within an interim conveyance to a Native Corporation is no longer "public land" under the Federal Land Policy and Management Act nor subject to Bureau of Land Management jurisdiction to issue rights-of-way under that Act.

New England Fish Co., 42 IBLA 200 (Aug. 22, 1979)

"Date of Location." Under 43 CFR 3833.0-5(h), for claims located in Nevada, "date of location" is the date indicated in the notice of location or discovery posted on an unpatented mining claim.

Jim Spicer, 42 IBLA 288 (Aug. 27, 1979)